

SMALL BUSINESS ISSUES AND
PRIORITIES—1983

BY STAFF MEMBERS OF THE
COMMITTEE ON SMALL BUSINESS
UNITED STATES SENATE
WITH
REPRESENTATIVES
OF
SMALL BUSINESS ORGANIZATIONS



FEBRUARY 25, 1983

Printed for the use of the Committee on Small Business

U.S. GOVERNMENT PRINTING OFFICE
WASHINGTON: 1983

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SENATE SMALL BUSINESS COMMITTEE'S ASSOCIATION MEETING

FEBRUARY 25, 1983

ROOM 428A-SR

9:30 a.m.

MR. JOHN FITCH
Vice President-Governmental Relations
National Association of Wholesaler
Distributors
Washington, D. C.

MR. BRUCE HAHN
Manager, Government Relations
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National Association of Realtors
Washington, D. C.

MR. JARED BLUM
Vice President & Legal Council
Direct Selling Association
Washington, D. C.

(III)

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MR. STEVEN DENLINGER
President
Latin American Manufacturers Association
Washington, D. C.

MR. CLARENCE BRADDOCK
President
Black Presidents Roundtable
Silver Spring, Maryland

MR. WILLIAM COCHRAN
Executive Director - Michigan Job Development Authority
Council on Pollution Control Financing Agencies
Washington, D. C.

MR. WALTER STULTS
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National Association of Small Business Investment Companies
Washington, D. C.

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President
Small Business Institute Director's Association
St. Louis, Missouri

MR. HORST DIENK
Chairman
Independent Bakers Association
Washington, D. C.

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Director of Legislative Advocacy
Small Business Service Bureau
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National Family Business Council
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American Vocational Association
Arlington, Virginia

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Senior Staff Vice President
National Audio-Visual Association
Fairfax, Virginia

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Assistant Director-Legislative Affairs
Printing Industries of America, Inc.
Arlington, Virginia

MR. WILLIAM E. WOODS
Executive Vice President
National Association of Retail Druggists
Washington, D. C.

MR. JIM ROGERS
Director-State Relations
National Restaurant Association
Washington, D. C.

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Attorney
Washington, D.C.

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Member, Small Business Committee
American Institute of Certified Public Accountants
Washington, D. C.

MR. ROGER PEUGEOT
Legislative Committee Member
National Association of Plumbing, Heating, Cooling Contractors
Washington, D. C.

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Associated General Contractors of America
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Nutley, New Jersey

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International Franchise Association
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National Solid Waste Management Association
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National Association of Manufacturers
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MR. RICHARD TROLL
Executive Director
Association of Independent Corrugated Converters
Alexandria, Virginia

MR. JOHN SATAGAJ
Director of Development and General Council
Door and Hardware Institute
McLean, Virginia

MR. PAT O'CONNOR
President
Plumbing and Heating Wholesalers
Washington, D. C.

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OPENING STATEMENT
SENATOR LOWELL WEICKER JR.
ASSOCIATIONS MEETING
FEBRUARY 25, 1983

GOOD MORNING. IT'S A PLEASURE TO BE HERE TO DISCUSS YOUR PRIORITIES FOR THE 98TH CONGRESS. WE ANTICIPATE THAT THE NEXT TWO YEARS WILL BE ACTIVE ONES FOR THE SMALL BUSINESS COMMITTEE, AND, WITH YOUR HELP, THAT THEY WILL BE REWARDING AND PRODUCTIVE AS WELL.

LESS THAN SIX WEEKS INTO THE SESSION, THIS COMMITTEE HAS ALREADY DEMONSTRATED ITS COMMITMENT TO SMALL BUSINESS BY WINNING PASSAGE OF TWO MAJOR SMALL BUSINESS BILLS IN THE SENATE. S.272, WHICH IMPROVES ACCESS TO FEDERAL PROCUREMENT INFORMATION FOR SMALL BUSINESSES, AND S.273, WHICH REAUTHORIZES THE SBA'S 8(A) PILOT PROCUREMENT PROGRAM, WERE ONLY THE THIRD AND FOURTH BILLS TO BE PASSED BY THE SENATE IN THIS SESSION. THAT, I THINK, SAYS SOMETHING ABOUT THE GROWING INFLUENCE OF THIS COMMITTEE, AND ABOUT THE NEW IMPORTANCE OF SMALL BUSINESS IN THE LEGISLATIVE PROCESS.

AS CHAIRMAN OF THIS COMMITTEE, I PLAN TO MAINTAIN THIS LEVEL OF ACTIVITY THROUGHOUT THE NEXT TWO YEARS. I FULLY INTEND TO CARRY OUT A VIGOROUS AGENDA, ONE THAT EMPHASIZES OUR ROLE AS AN ADVOCATE FOR SMALL BUSINESS ON A BROAD RANGE OF ISSUES AND CONCERNS.

IN THE COMING MONTHS, THIS COMMITTEE WILL FOCUS ON THE CRUCIAL ISSUES OF JOB CREATION AND ECONOMIC DEVELOPMENT, AS WE CONTINUE TO SEARCH FOR WAYS TO GET OUR ECONOMY GOING AGAIN. TAX REFORMS AND INITIATIVES FOR SMALL BUSINESS, TO REMOVE SOME OF THE CAPITAL BARRIERS THAT HINDER EXPANSION AND GROWTH, WILL AGAIN BE STUDIED. AND, THE COMMITTEE WILL LOOK INTO NEW AREAS WITH POTENTIAL FOR ENORMOUS SMALL BUSINESS DEVELOPMENT, SUCH AS EXPORTING AND HIGH TECHNOLOGY.

WE APPRECIATE YOUR TIME AND EFFORT IN COMING
HERE TODAY. LET ME ASSURE YOU THAT WHAT YOU
HAVE TO SAY WILL BE CAREFULLY CONSIDERED AS
WE LOOK FOR WAYS TO STIMULATE AND STRENGTHEN
THE SMALL BUSINESS SECTOR OF OUR ECONOMY.

I LOOK FORWARD TO WORKING WITH ALL OF YOU
TO REACH THAT COMMON GOAL.

NATIONAL ASSOCIATION OF WHOLESALE-DEALERS

STATEMENT OF

John H. Fitch, Jr.
Vice President, Government Relations
National Association of Wholesaler-Dealers

BEFORE THE

Senate Select Committee on Small Business
February 25, 1983

ON

Committee Agenda for Action
for the 98th Congress



1725 K Street, N.W. • Washington, D.C. 20006 • 202/872-0885

SUMMARY STATEMENTJOHN H. FITCH, VICE PRESIDENT-GOVERNMENT RELATIONSNATIONAL ASSOCIATION OF WHOLESALER-DISTRIBUTORSSENATE SELECT COMMITTEE ON SMALL BUSINESS

FEBRUARY 25, 1983

NAW firmly beleives that the issues facing small business in 1983 are bipartisan in nature, and applauds the efforts of this Committee for expressing an interest in advocating and defending the following small business legislative goals:

- CAPITAL FORMATION/RETENTION ISSUES: Coupled with reducing interest rates and government spending, capital formation and retention is the most important issue for NAW's labor-intensive members. This includes:
 - o Corporate rate reductions;
 - o Preservation of accelerated depreciation for structures, as it currently exists;
 - o ITCs for warehouses and other structures;
 - o Preservation of IDBs for private sector use, including reinstatement of of small issue IDBs after 1986; and restoration of ACRS for IDB-financed structures;
 - o Restoration of the safe-harbor leasing provision of ERTA along with the closely-held lessor amendment included in TEFRA;
 - o Inventory valuation simplification and reform;
 - o Preservation of ERTA's direct expensing provision for depreciable personal property;
 - o Preservation of ERTA's ITC for used machinery valued up to \$150,000;
 - o Repeal or delay of Treasury regulations defining debt and equity for tax purposes unless small business safe-harbors are included.
- PRODUCT LIABILITY: NAW strongly supports Senator Robert Kasten's (R-WI) Uniform Product Liability Act (S. 44). It would reinstate fairness and equity to the current legal

system by restoring the negligence/fault standard, and allow reasonable defenses for product sellers when a liability action is brought.

- SBA SIZE STANDARDS: The Small Business Administration is about to issue a new round of size standards proposals. NAW has opposed previous proposals because they were unrealistic and would detrimentally affect wholesaler-distributors in the procurement/regulatory area. A close look at the revised version is imperative.
- FEDERAL PROCUREMENT: NAW would urge support for OFPP's contracting out policy, and legislative enactment of the Uniform Federal Procurement Act. As it currently exists, the complex burdensome Federal procurement system works against small business.
- REGULATORY REFORM: NAW endorses efforts to curb federal spending; to require small business regulatory impact statements or other cost-benefit mechanisms; and, to mandate sunseting of federal programs and regulatory agencies.
- FICA/FUTA PAYROLL TAXES: NAW urges the Committee to minimize the proposed increase in Social Security payroll taxes, and repeal the TEFRA FUTA tax increase. Both fall hardest on small business and increase the cost of labor at a time when job creation is the key to economic recovery.
- PARTIAL LIQUIDATION/STOCK REDEMPTION: TEFRA's repeal of the partial liquidation rules and modifications to the stock redemption provision of the tax code severely impacts closely-held businesses. These provisions must be restored.
- BUSINESS PERPETUATION: Repeal of ERTA's estate tax provisions would be disastrous for perpetuation of independent family-owned business such as wholesaler-distributors. It must be preserved at all costs.
- MULTIEMPLOYER PENSION PLAN ACT AMENDMENTS OF 1980: NAW strongly encourages the Committee to work with the Labor Committee to resolve the severe and unreasonable financial and legal impact MPPAA has on small, closely-held businesses with unionized employees.

In conclusion, Mr. Chairman, NAW appreciates the opportunity to present our views on these issues which we believe the Committee should focus during the 98th Congress.

FULL STATEMENT

Mr. Chairman, Members of the Committee, my name is John H. Fitch, Jr., Vice President for Government Relations for the National Association of Wholesaler-Distributors (NAW).

NAW is a federation of 123 national wholesaler-distributor associations listed in Appendix A. These organizations have a collective membership of approximately 45,000 member firms with 150,000 places of business. They are located throughout the fifty states, essentially in proportion to the population. Moreover, NAW has an individual firm membership of 7,000.

Our industry is characterized preponderantly by small- to medium-sized firms. Thus, the typical wholesaler-distributor has an annual gross sales volume of \$5 to \$7 million and employs 40 individuals. Nonetheless, when viewed in the aggregate, merchant wholesaler-distributors constitute a vital sector of our economy, as evidenced by the Commerce Department's estimate that they would be responsible for more than one trillion dollars of economic activity during 1983. Further information on the structure and significance of the wholesale distribution industry to the nation's economy is contained in Appendix B.

Mr. Chairman, I welcome this opportunity to present to the Committee the views of our members on what we believe to be the primary issues for the 98th Congress.

However, before I get into the substance of my remarks, I would like to comment on an observation I believe symbolizes the commitment of the Committee to achieving the goals and objectives of small business--the fact that both you, Mr. Chairman, and Senator Nunn, the ranking minority member of the Committee, signed the letter of invitation to appear here today.

NAW firmly believes that the issues facing small business are bipartisan in nature and cut across party lines in terms of their impact.

It is also a signal to the small business community that this Committee intends to continue the aggressive advocacy role on which rests much of this Committee's success.

I stress advocacy because small business is getting buffeted by the actions being taken by the Senate Finance Committee and I see little if any strong advocacy on the part of this Committee to protect the interests of small business in that arena.

NAW applauds this effort and pledges to support the activity of the Committee in achieving its advocacy and legislative goals.

Capital Formation/Retention

Coupled with reducing interest rates and government spending, capital formation and retention is the most important issue for our members. In this regard, I have with me copies of a study recently completed for NAW by the accounting firm of Arthur Andersen and Company on the future trends in the wholesale distribution industry. I think you will find it quite interesting and valuable.

Given the nature of the typical wholesaler-distributor: family-owned; the location of wholesaler-distributors: large metropolitan areas; and the financial structure of a wholesale distribution firm: 40% inventories, 40% receivables, and 20% capital assets (primarily warehouses); NAW is directly interested in the following capital formation/retention issues:

- (1) corporate rate reductions;
- (2) preservation of accelerated depreciation for structures as it currently exists;
- (3) investment tax credits for warehouses and other structures;
- (4) Preservation of industrial development bonds for private sector use and reinstatement of small issue

IDB's after 1986 and restoration of ACRS for IDB financed structures;

- (5) restoration of the safe-harbor leasing provision of ERTA along with the closely-held lessor amendment enacted in TEFRA;
- (6) simplification and reform of the inventory valuation methods for tax purposes;
- (7) preservation of the direct expensing provision for depreciable personal property contained in ERTA;
- (8) preservation of the investment tax credit for used machinery up to a value of \$150,000 contained in ERTA;
- (9) repeal or delay of Treasury regulations defining debt and equity for tax purposes until and unless suitable small business safe harbors have been included.

We also take note of the fact that many of the recommendations of the 1980 White House Conference on Small Business have not been implemented. A comprehensive bill similar to S. 360 incorporating NAW's recommendations as well as some of the Conference recommendations not yet enacted would be an excellent vehicle to rally the small business community.

Finally, NAW also supports efforts to reform the banking and securities laws along the lines recommended by the SEC Business Forum on Small Business Capital Formation which has submitted its report to the committee. NAW was a member of the Executive Committee.

Product Liability

The next major area of concern to wholesaler-distributors is product liability. The concerns here focus on the need for uniformity in tort law as it relates to products liability.

In this regard, NAW is working to reform the tort laws through enactment of a federal Uniform Product Liability Act (S. 44), introduced by Majority Leader Baker for Senator Kasten (R-WI) and others and which was developed by the 250 member Product Liability Alliance with the support of the Administration. The Uniform Product Liability Act would restore fairness and equity to the current legal system by restoring the negligence/fault standard and allowing reasonable defenses for product sellers when a liability action is brought.

Commerce Secretary Malcolm Baldrige and key members of the Senate and House Commerce Committees have all indicated an active interest in seeking an equitable solution to this critical issue.

Last Congress, a uniform product liability bill was favorably reported out of the Senate Commerce Committee after extensive hearings.

I would urge each of you as advocates for the small business community in the Senate, to join with your colleagues in seeking redress for the untenable product liability environment that small businesses find themselves facing; particularly with the mirade of difficult state tort laws and their varying liability requirements and the increased mobility of goods across state lines.

SBA Size Standards

Not since the days of the attempt to merge the Senate Select Committee on Small Business with the Agriculture Committee has an issue raised such hue and cry from the small business community.

NAW lent its voice to the cacophony. Our objectives focused primarily on the underlying conceptual flaw in the economic assumptions upon which the proposals were grounded and also the applicability of the standards to the procurement area and other government programs--particularly in view of the enactment of the Regulatory Flexibility Act, Equal Access to Justice Act, the Investment Incentive Act, and the Paperwork Reduction Act.

While SBA's most recent offerings have been somewhat responsive to industry concerns, we have yet to see the newest revisions (which I understand are due out soon) and therefore we withhold any comment thereon until we carefully examine the proposals.

I would encourage this Committee, once the revised rules are proposed to hold hearings on them to determine their impact on the small business community as a whole.

Federal Procurement

In this regard, NAW would encourage the Committee to support the contracting out policy of the Office of Federal Procurement Policy and would also urge the Committee to direct attention to the OFPP's Uniform Federal Procurement Act which was sent to Congress in 1982 and push for its legislative enactment this year.

Further, NAW would enlist the Committee's support to insure that GSA and other federal agencies are not unnecessarily warehousing goods that could be readily purchased in quantity from local wholesaler-distributors who, as a matter of course, store such items and at less cost to the government.

Finally, NAW is urging OFPP to raise the regional and national thresholds for contracts to be included in the Federal Supply

Schedule as they now appear in OFPP's draft Federal Acquisition Regulations (FAR). This would drop thousands of items from the Supply Schedule and allow government purchasing officers and user agencies to purchase those goods and supplies directly from local vendors. This also would be a tremendous cost saver to the Federal Government.

Regulatory Reform

As is the case with other small businesses, wholesaler-distributors are strongly supportive of any effort to reduce the federal regulation of business and the concomitant paperwork and compliance costs related thereto.

In this regard, NAW supports efforts to curb federal spending; to require small business regulatory impact statements or other cost-benefit mechanisms; and to mandate sunseting of federal programs and regulatory agencies.

Moreover, NAW urges this Committee to actively oversee the implementation of the Regulatory Flexibility Act, the Paperwork Reduction Act; and the Equal Access to Justice Act--valuable tools in the fight to reduce the federal burden on small business.

FICA and FUTA Payroll Taxes

NAW would urge the Committee in the strongest of terms to minimize the increase in the Social Security payroll taxes which appears imminent. A tax increase is not the solution to the long-term solvency problem. Moreover, it falls hardest on small business and increases the cost of labor at a time when job creation is the key to economic recovery.

Another increase in labor costs was the FUTA tax raise that was enacted last year in TEFRA. It should be repealed. I so urge the Committee.

Partial Liquidation and Stock Redemption

The repeal of the partial liquidation rules and modifications to the stock redemption provision of the tax code by TEFRA fall heaviest on closely-held businesses. Those provisions must be restored.

Business Perpetuation

Estate taxes are the single most inhibiting factor to perpetuation of independent family-owned businesses such as wholesaler-distributors.

Repeal of the estate tax provisions of ERTA as proposed by the Chairman of the House Ways and Means Committee would be disastrous.

This Committee must stand firm against any such efforts. If it does nothing else in 1983, preservation of the ERTA estate tax provisions would justify the Committee's *raison d'etat*.

Multiemployer Pension Plan Act Amendments of 1980

NAW strongly encourages the Committee to work with the Labor Committee in seeking a resolution to the severe and unreasonable economical and legal impact these amendments have on small, closely-held businesses who have unionized employees.

Changes must be made to relieve this totally onerous and unfair law.

In conclusion, Mr. Chairman, NAW appreciates the opportunity to present our views on these issues on which we believe the Committee should focus during the 98th Congress.

APPENDIX

About NAW and the Wholesale Distribution Industry

The National Association of Wholesaler-Distributors is a federation of 123 national wholesaler-distributor trade associations (see attached list) which have a collective membership of approximately 45,000 firms nationwide, with 150,000 places of business.

The members of our affiliate associations are responsible for over 60 percent of the \$1.16 trillion of merchandise which flowed through wholesale distribution channels in 1982.

They also employ a comparable percentage of the 5,290,000 Americans working in the wholesale trade sector in well-paying year-round jobs. In 1982, average hourly earnings in the industry of \$7.95 were ahead of the national hourly average of \$5.46 by a full 32 percent. Moreover, the average annual wage in wholesale distribution in 1982, according to the U.S. Department of Commerce, was \$15,833--\$4,938 higher than the national median annual wage of \$10,895.

While industry sales topped \$1.16 trillion in 1982, wholesale distribution continues to be dominated by small- to medium-sized, closely-held, family-owned businesses. The typical wholesaler-

distributor employs from 30 to 50 people, has annual sales in the \$3-\$5 million range and has an after tax profit of \$100,000 - \$150,000.

Because wholesale distribution is a labor-intensive, as opposed to capital-intensive business, most of the costs beyond financing inventory are related to the costs of employment. Payrolls typically run from \$600,000 to \$1,000,000 or more annually for firms in many commodity lines. Employer payroll taxes under the current rate of 6.7 range from \$40,000 to \$70,000 in these companies. Combined with the other benefits commonly offered by most wholesaler-distributors, payroll or employment costs can easily consume 25 percent of a firm's weekly gross earnings. When added to the other costs of doing business, such as the financing of substantial inventories, energy, transportation, office equipment and other costs, it is easy to see why restrictive cash flow is a constant problem for many industry firms.

Difficult economic times have substantially impacted the wholesale distribution sector. Weak sales during this prolonged recession have cut deeply into already thin profit margins. Record interest rates through 1981 and 1982 have kept operating and inventory costs high and for many the adjustment period is far from over. A substantial portion of the industry in the durable goods business is directly connected to the construction,

automotive and industrial sectors of our economy and has suffered accordingly.

Despite difficult economic times, wholesaler-distributors continue to fulfill an important function in our society. They make goods and commodities of every description available at the place and time of need. Wholesaler-distributors purchase goods from producers, inventory these goods, break bulk, sell, deliver and extend credit to retailers and industrial, commercial, institutional, governmental and contractor business users.

Wholesaler-distributors are essential to the efficient satisfaction of consumer and business needs. Further, by the market coverage which they offer smaller suppliers and the support which they provide to their customers, wholesaler-distributors preserve and enhance competition, the critical safeguard of our economic system. According to an NAW survey, the typical wholesaler-distributor established market connections between 133 manufacturers and 533 business customers. Many of these manufacturers are themselves small businessmen who must rely on wholesaler-distributors to establish, maintain and nurture markets for their products. The majority of customers are small businessmen, also, who look to the merchant wholesaler-distributor to provide merchandise availability, credit and other critical services.

National Wholesaler-Distributor Organizations Affiliated with the National Association of Wholesaler-Distributors

Air-conditioning & Refrigeration Wholesalers
American Dental Trade Association
American Jewelry Distributors Association
American Machine Tool Distributors Association
American Supply Association
American Traffic Services Association
American Veterinary Distributor Association
Amusement & Vending Machine Distributors Association
Appliance Parts Distributors Association, Inc.
Associated Equipment Distributors
Associated Wire Rope Fabricators
Association of Footwear Distributors
Association of Steel Distributors
Automotive Service Industry Association
Aviation Distributors & Manufacturers Association

Bearing Specialists Association
Beauty & Barber Supply Institute, Inc.
Bicycle Wholesale Distributors Association, Inc.
Biscuit & Cracker Distributors Association

Ceramic Tile Distributors Association
Ceramics Distributors of America
Coated Abrasives Fabricators Association
Copper & Brass Servicenter Association
Council for Periodical Distributors Association
Council of Wholesale Distributors
American Institute of Kitchen Dealers

Distributors Council, Inc.
Door & Hardware Institute
Drug Wholesalers Association

Electrical Electronics Materials Distributors Assn.
Explosive Distributors Association, Inc.

Farm Equipment Wholesalers Association
Flat Glass Marketing Association
Fluid Power Distributors Association, Inc.
Food Industries Suppliers Association
Foodservice Equipment Distributors Association

General Merchandise Distributors Council

Health Industry Distributors Association
Hobby Industry Association of America

Independent Medical Distributors Association
Institutional & Service Textile Distributors Association, Inc.
International Ceramic Association
Irrigation Association

Machinery Dealers National Association
Mass Merchandising Distributors Association
Material Handling Equipment Distribution Association
Monument Builders of North America-Wholesale Div.
Motorcycle Industry Council
Music Distributors Association

National American Wholesale Grocers' Association
National Appliance Parts Suppliers Association
National Association of Aluminum Distributors
National Association of Chemical Distributors
National Association of Container Distributors
National Association of Decorative Fabric Distributors
National Association of Electrical Distributors
National Association of Fire Equipment Distributors
National Association of Floor Covering Distributors
National Association of Manufacturing Opticians
National Association of Marine Services, Inc.

National Association of Meat Purveyors
National Association of Plastics Distributors
National Association of Recording Merchandisers, Inc.
National Association of Service Merchandising
National Association of Sporting Goods Wholesalers
National Association of Textile & Apparel Distributors
National Association of Tobacco Distributors
National Association of Writing Instrument Distributors
National Beer Wholesalers Association
National Building Material Distributors Association
National Business Forms Association
National Candy Wholesalers Association
National Commercial Refrigeration Sales Association
National Electronic Distributors Association
National Fastener Distributors Association
National Food Distributors Association
National Frozen Food Association
National Grocers Association
National Independent Bank Equipment Suppliers Assn.
National Industrial Belting Association
National Industrial Glove Distributors Association
National Lawn & Garden Distributors Association
National Locksmith Suppliers Association
National Marine Distributors Association
National Paint Distributors, Inc.
National Paper Trade Association, Inc.
National Plastercraft Association
National Sash & Door Jobbers Association
National School Supply & Equipment Association
National Solid Wastes Management Association
National & Southern Industrial Distributors Associations
National Spa and Pool Institute
National Truck Equipment Association
National Welding Supply Association
National Wheel & Rim Association
National Wholesale Druggists' Association
National Wholesale Furniture Association
National Wholesale Hardware Association
North American Heating & Air-conditioning Wholesalers
North American Wholesale Lumber Association, Inc.

Optical Laboratories Association
Outdoor Power Equipment Distributors Association

Pet Industry Distributors Association
Petroleum Equipment Institute
Power Transmission Distributors Association, Inc.

Safety Equipment Distributors Association, Inc.
Scaffold Industry Association
Shoe Service Institute of America
Specialty Tools & Fasteners Distributors Association
Spring Service Association
Steel Service Center Institute

Textile Care Allied Trades Association
Toy Wholesalers' Association of America

United Pesticide Formulators & Distributors Association

Wallcovering Distributors Association
Warehouse Distributors Association for
Leisure & Mobile Products
Watch Materials & Jewelry Distributors Association
Water and Sewer Distributors Association
Wholesale Florists & Florist Suppliers of America
Wholesale Stationers' Association, Inc.
Wine & Spirits Wholesalers of America, Inc.
Wood Heating Alliance
Woodworking Machinery Distributors Association

NATIONAL ASSOCIATION OF WHOLESALER-DISTRIBUTORS
1725 K Street, N.W., Washington, D.C. 20006 • 202/872-0885

**NATIONAL TOOLING &
MACHINING ASSOCIATION**

9300 LIVINGSTON ROAD, FT. WASHINGTON, MD 20744



301/248-6200
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STATEMENT OF
THE
NATIONAL TOOLING & MACHINING ASSOCIATION
BEFORE THE
SENATE COMMITTEE ON SMALL BUSINESS
FEBRUARY 25, 1983

Mr. Chairman and Members of the Committee:

We appreciate the opportunity to offer our suggestions for the priorities of the Senate Committee on Small Business during the 98th Congress. While we recognize that not all issues effecting the small business community come under the domain of this committee, we strongly suggest that the committee take a strong role of advocacy working behind the scenes with other members of the Senate who may be on committees which oversee legislation on small business, as well as taking an active role in holding hearings, issuing press releases, and holding news conferences on issues that have a significant impact on the small business community. Specifically, we recommend that the following issues be addressed:

1. Procurement -- The small business community gets far less than its proportionate share of federal expenditures for goods and services. This has resulted from two phenomenon: the increasing trend towards the government doing a high proportion of previously contracted out work in-house, and the decline over the years in the percentage of contracts that are procured through competitive bid. This trend away from competitive procurement, which now account for between 7% and 15% of total procurements, has been accompanied by a parallel trend in the amount of sole-source procurements going to large firms. Both issues should be treated separately. We feel that the solution to the declining small business share of existing procurements is directly related to the decline in competition. We strongly urge this committee to investigate this problem and to consider legislation which would increase the percentage of federal procurements which are decided by open competitive bid.

The issue of contracting out also affects small businesses because they are not only getting a declining percentage of existing federal procurements, but the total base itself is slipping. The committee should investigate means of insuring that work done more efficiently by the private sector is either kept in the private sector or returned to the private marketplace. Any legislative or regulatory proposals should not contain any provisions that might further weaken the already small share of federal procurements going to the small business sector.

2. International Trade -- Equally important is the impact of foreign trade on small business. This problem also has several facets. In the first place, foreign companies are increasingly moving into direct competition with small U.S. manufacturers. Secondly, virtually every small business may be

affected indirectly as its share of sales to larger companies or the employees of larger companies declines. There is a lack of hard evidence on the total magnitude of the problem. We strongly suggest that this committee study the problem to determine its impact on small businesses from every sector of the economy and take a hard look at international trade laws to see if the present framework of the General Agreement on Tariffs and Trade truly addresses all issues affecting the fairness of trade between countries.

3. Taxation -- A large number of taxation issues directly affecting the small business community should be addressed. We need a Social Security system which is actuarially sound. Legislation similar to that proposed by the Social Security Commission should be enacted. Proposed tax increases that directly affect the small business community should be strongly opposed. Specifically, we suggest that proposals to repeal the future phase-in of estate tax exclusions and capital expensing be opposed. We recommend a reduction in the rate on capital gains, in the corporate rate at the lower end of the scale, an increase in the maximum amount of used equipment eligible for the investment tax credit, and an increase in the allowable accumulated earnings. Of particular importance is the protection of the right of small businesses to use industrial development bonds. We also support inventory evaluation legislation introduced in the last Congress.

4. Jobs Legislation -- We feel that this committee should be concerned with all proposed jobs legislation. Small businesses provide the great majority of jobs in the American economy and this ability should be taken into account in the development of legislation aimed at increasing U.S. employment. We strongly prefer a system of tax credits to direct federal expenditures in job creation because we feel the former will be more effective and more lasting. Because of the current high level of unemployment and the high budget deficit, any tax credits should be structured to stimulate the addition of new jobs which otherwise would not have been created. We suggest that you look closely at the areas of technical skills because this is where the jobs are available and where tax credits may provide an offsetting stimulus to the extremely high cost of training.

5. Product Liability -- Tort reform legislation should be enacted in this Congress. Because the risks and product liability exposure, as well as product liability insurance costs, most impact the small business community, we feel that the chairman and other members of this committee could signal their support for small business by cosponsoring S. 44, the Product Liability Act of 1983.

6. Legislative & Regulatory Activities -- The committee should maintain a vigilant oversight of legislation and

regulatory activities affecting the small business community. Legislation of importance includes the Regulatory Flexibility Act, the Equal Access to Justice Act, the Freedom of Information Act, and the enforcement of anti-trust laws by the Federal Trade Commission.

Thank you very much.

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TESTIMONY

BY

DR. JOHN M. ALBERTINE, PRESIDENT
AMERICAN BUSINESS CONFERENCE

BEFORE THE

SENATE COMMITTEE ON SMALL BUSINESS

FEBRUARY 25, 1983

TESTIMONY OF
DR. JOHN M. ALBERTINE
PRESIDENT OF THE AMERICAN BUSINESS CONFERENCE
BEFORE THE
SENATE COMMITTEE ON SMALL BUSINESS

FEBRUARY 25, 1983

GOOD AFTERNOON. MY NAME IS JACK ALBERTINE, AND I AM THE PRESIDENT OF THE AMERICAN BUSINESS CONFERENCE. THE AMERICAN BUSINESS CONFERENCE IS A COALITION OF THE CHIEF EXECUTIVE OFFICERS OF NEARLY ONE HUNDRED MID-SIZE, HIGH-GROWTH COMPANIES. THE MEMBER FIRMS OF THE ABC HAVE ANNUAL REVENUES BETWEEN \$25 MILLION AND \$1 BILLION, AND EACH HAS DOUBLED IN SIZE OVER THE LAST FIVE YEARS. BECAUSE OF THEIR FANTASTIC GROWTH PERFORMANCE, THESE FIRMS REPRESENT THE WINNERS OF THE AMERICAN FREE ENTERPRISE SYSTEM.

A MONTH AGO, THE AMERICAN BUSINESS CONFERENCE JOINED WITH THE NATIONAL ASSOCIATION OF MANUFACTURERS AND THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS TO CALL FOR A 25% REDUCTION IN THE PROJECTED DEFICIT FOR FISCAL YEAR 1984. WE MADE THAT STATEMENT BECAUSE WE WERE, AND CONTINUE TO BE, CONCERNED ABOUT THE IMPACTS WHICH THESE HUGE PROJECTED DEFICITS WOULD HAVE ON THE LONG-AWAITED ECONOMIC RECOVERY. ECONOMISTS HAVE BEEN WAITING, LIKE EXPECTANT PARENTS, FOR THIS RECOVERY FOR ALMOST A YEAR AND A HALF. ON THE BASIS OF RECENT ECONOMIC DATA, IT NOW APPEARS THAT THIS ILLUSORY RECOVERY HAS FINALLY STARTED.

THERE ARE A NUMBER OF SIGNS WHICH POINT UNMISTAKABLY TO THAT CONCLUSION. INDUSTRIAL PRODUCTION WAS UP .9% IN JANUARY. HOUSING STARTS WERE UP 36% TO AN ANNUAL LEVEL OF 1.7 MILLION IN JANUARY, DOUBLE WHAT THEY WERE A YEAR AGO.

THE INDEX OF LEADING INDICATORS, RELEASED BY THE COMMERCE DEPARTMENT, HAS BEEN TRENDING UP SINCE APRIL.

WHILE THE FOURTH QUARTER FIGURES FOR REAL G.N.P. WERE DOWN, THAT WAS LARGELY THE RESULT OF A MASSIVE DROP IN INVENTORIES. EXCESS INVENTORIES HAVE BEEN LIQUIDATED. INVENTORIES ARE NOW SO LOW THAT PRODUCTION MUST BE EXPANDED.

HOWEVER, I DOUBT THAT THIS RECOVERY CAN BE SUSTAINED UNLESS YOU TAKE SERIOUS STEPS TO CUT SPENDING. BUSINESSMEN ARE ALARMED BY THE TREMENDOUS ESCALATION IN THE SIZE OF THE FEDERAL DEFICITS. THEY BELIEVE THAT DEFICITS OF THIS MAGNITUDE WILL PUT TREMENDOUS PRESSURE ON THE FINANCIAL MARKETS. SOONER OR LATER, LIKE IT OR NOT, HUGE DEFICITS WILL PUSH INTEREST RATES BACK UP.

I THINK THAT EVEN A MODERATE INCREASE IN INTEREST RATES IN THE NEXT TWELVE MONTHS COULD CAUSE THE RECOVERY TO STALL. WITH OVER 11 MILLION AMERICANS OUT OF WORK AND WITH TREMENDOUS COMPETITION FROM ABROAD, WE CANNOT AFFORD TO LET THE ECONOMY SLIP BACK INTO A PROLONGED RECESSION. WE MUST KEEP THE DEFICIT AS LOW AS POSSIBLE BY CUTTING SPENDING AS MUCH AS POSSIBLE. WHILE I CERTAINLY APPLAUD THE ADMINISTRATION'S EFFORTS TO CUT SPENDING, I HOPE THAT YOU WILL GIVE THE PRESIDENT EVEN DEEPER BUDGET CUTS THAN HE HAS REQUESTED.

A MONTH AGO, WE CALLED FOR A SPENDING REDUCTION OF BETWEEN \$45 AND \$55 BILLION. THE PRESIDENT'S FY 1984 BUDGET SUBMISSION INCLUDES SAVINGS OF \$35 BILLION OVER THE CURRENT SERVICES BUDGET. WE ASKED THAT THE FY 1984 DEFICIT BE LOWERED BY 25%. THE DEFICIT IN THE BUDGET SUBMITTED BY THE PRESIDENT IS 18% LOWER

THAN THE CURRENT SERVICES DEFICIT. IF THE RECOVERY IS 1% STRONGER THAN THE ADMINISTRATION'S BASELINE, AND I THINK IT CAN BE, THEN THE DEFICIT WOULD BE MORE THAN 23% BELOW THE CURRENT SERVICES LEVEL.

IN THIS CITY WHERE ADMINISTRATION FORECASTS HAVE OFTEN BEEN OUTRAGEOUSLY OPTIMISTIC, MARTY FELDSTEIN'S FORECASTS HAVE BROKEN NEW GROUND. I DON'T WANT TO SAY THAT MARTY FELDSTEIN IS A PESSIMIST, BUT WHEN HIS TEN-YEAR OLD ASKED HIM, "DADDY, WHAT AM I GOING TO BE WHEN I GROW UP?" MARTY JUST PATTED HER ON THE HEAD AND SAID, "POOR." I THINK THAT IF THE CONGRESS HAS THE COURAGE TO MAKE SIGNIFICANT SPENDING CUTS, WE WILL ENJOY A MUCH STRONGER RECOVERY THAN MARTY'S FORECAST INDICATES, AND NOBODY'S KIDS, NOT EVEN MARTY'S, WILL HAVE TO BE POOR.

WHILE IT IS NOT MY PLACE TO MAKE SPECIFIC RECOMMENDATIONS, I THINK THAT THERE IS JUSTIFICATION FOR IMPOSING FURTHER LIMITATIONS ON THE COST OF LIVING ADJUSTMENTS FOR THE ENTITLEMENT PROGRAMS. OVER THE LAST TEN YEARS, BENEFITS FROM ENTITLEMENT PROGRAMS HAVE RISEN FASTER THAN WAGES. I ALSO BELIEVE THAT THERE IS ROOM FOR FURTHER CUTS IN DEFENSE SPENDING. ADDITIONAL BUDGET CUTS WILL LOWER THE INTEREST CHARGES THAT THE GOVERNMENT MUST PAY AS WELL.

THE MOST IMPORTANT MESSAGE THAT I WANT TO CONVEY TO YOU TODAY IS THAT THE BUDGET DEFICITS SHOULD BE REDUCED BY SPENDING CUTS, NOT BY TAX INCREASES. I KNOW THIS IS EASIER SAID THAN DONE. A FEW YEARS AGO I WORKED FOR SENATOR BENTSEN AS THE EXECUTIVE DIRECTOR OF THE JOINT ECONOMIC COMMITTEE. AT THAT TIME, WE DID

NOT WORRY MUCH ABOUT DEFICITS. IN FACT, ONE OF OUR MAJOR HEADACHES WAS SOMETHING CALLED "SPENDING SHORTFALLS." "SPENDING SHORTFALLS" WERE WHAT YOU GOT WHEN THE FEDERAL GOVERNMENT SPENT LESS THAN IT WAS SUPPOSED TO SPEND, AND, CONSEQUENTLY, THE DEFICIT WAS BELOW THE PROJECTIONS. PROBABLY AT NO TIME IN THE HISTORY OF FISCAL POLICY HAS AN ECONOMIC PROBLEM BEEN CURED AS THOROUGHLY AND RESOUNDINGLY AS THE SHORTFALL PROBLEM OF THE LATE 1970's.

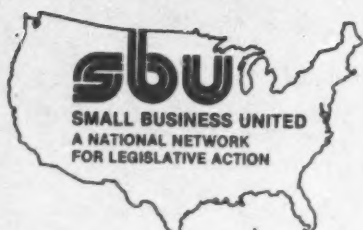
CURING THE CURRENT FISCAL CRISIS IS NOWHERE NEAR AS EASY. AS YOU KNOW, THE AMERICAN BUSINESS CONFERENCE LED THE COALITION OF OVER 150 ASSOCIATIONS AND CORPORATIONS SUPPORTING THE TAX EQUITY AND FISCAL RESPONSIBILITY ACT OF 1982. THE MEMBERS OF THE AMERICAN BUSINESS CONFERENCE VOTED LAST MARCH TO SUPPORT A TAX INCREASE ON BUSINESS AS PART OF A PACKAGE OF TAX HIKEs AND

SPENDING CUTS DESIGNED TO PARE THE DEFICITS. WELL, WE GOT OUR TAX INCREASE, BUT THE SPENDING CUTS WERE PRETTY SLOW IN COMING. NOW, THERE IS TALK OF ADDITIONAL TAX INCREASES, INCLUDING POSTPONING OR ELIMINATING THE THIRD YEAR OF THE PERSONAL TAX CUTS INSTITUTED UNDER THE ECONOMIC RECOVERY TAX ACT OF 1981 OR IMPOSING VARIOUS SURCHARGES ON INDIVIDUAL AND CORPORATE INCOME.

I THINK THAT ANY FURTHER TAX INCREASES AT THIS TIME WOULD BE A SERIOUS ERROR. THE DEFICIT MUST BE REDUCED BY SLICING SPENDING, NOT BY RAISING TAXES. FURTHER INCREASES IN TAXES WOULD PROVIDE JUST AS MUCH OF A THREAT TO THE RECOVERY AS RAPIDLY RISING DEFICITS.

THE INFANT RECOVERY HAS ARRIVED. I SUGGEST THAT WE PASS OUT CIGARS AND THEN GUARANTEE THE RECOVERY A LONG AND PROSPEROUS LIFE BY REDUCING THE PROJECTED FEDERAL DEFICITS THROUGH SPENDING CUTS AND SPENDING CUTS ALONE.

THANK YOU!



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Washington
Presentation
May 3-4, 1983

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STATEMENT OF
JOHN C. RENNIE
PRESIDENT-ELECT
SMALL BUSINESS UNITED
(SBU)

before the

COMMITTEE ON SMALL BUSINESS
UNITED STATES SENATE

February 25, 1983

SBU'S LEGISLATIVE PRIORITIES
FOR THE 98th CONGRESS

MR. CHAIRMAN AND MEMBERS OF THIS COMMITTEE:

My name is Jack Rennie. I am President-elect of Small Business United (SBU), a national coalition of 16 regional, state and metropolitan trade associations. I am also President of the Smaller Business Association of New England, a member of SBU. We are pleased to have this opportunity to discuss SBU's 1983 legislative priorities with you.

Mr. Chairman, this Committee has historically played a key, indispensable role in achieving the small business legislative victories realized in the last few years. For instance, most if not all of the small business tax incentives, but for your leadership and commitment, would not have been included in the 1981 omnibus tax bill. Again, thanks to the perseverance of you and other Members of the Committee, those 1981 victories were retained last year. The most notable example is the preservation of the Industrial Revenue Bond (IRB) small issue exemption. Passage of the late payment legislation is another example of one of our priority goals that would have never been realized if this Committee had not worked closely with and been helpful to the Government Affairs Committee. I could cite numerous other examples, but my point is, Mr. Chairman, that it is our fervent hope that you and your colleagues will continue to champion our cause in other committees, particularly the Finance Committee, and that we

can work in partnership with you throughout the 98th Congress. The fact is, without the strong advocacy of you and the Committee, small business has little hope of achieving few, if any, of its legislative goals which will be outlined at this morning's meeting.

Having spoken to the role of the Committee, let me briefly highlight SBU's legislative priorities, most of which require approval from other committees.

Tax policy remains a top priority for SBU this year. We would like to see the small business benefits of the 1981 tax bill--liberalization of estate tax law, direct expensing, an increase in the ceiling for the used equipment investment tax credit, which you sponsored, Mr. Chairman, and the third year of the tax cut--preserved. Any renewed attack on IRBs needs to be turned aside as well.

Investment in small concerns through small business participating debentures, needs to be promoted. We have been working closely with your staff on a draft SBPD bill. We are looking forward to participating with you in Senate Finance Committee hearings which we trust will be scheduled this spring after the introduction of your bill.

Investment in small concerns must also be fostered through the repeal of Section 385 of the Internal Revenue Code. After nearly 14 years and numerous attempts by the Treasury Department to comply with the law, it is evident that the Department cannot

draft reasonable, understandable and fair debt-equity regulations. Statutory repeal of Section 385, and reliance upon case law is the best solution to the problem.

And finally, investment in small concerns can be achieved through the enactment of a capital gains rollover bill or a bill incrementally reducing capital gains taxes on new issues held for a minimum period of time such as three years.

A general, broad-based tax credit applied against payroll taxes is needed to provide an incentive for small business to hire and therefore reduce unemployment. We question the wisdom of another multi-billion dollar federal jobs program which would likely benefit a relatively small number of the unemployed when real legislative attention should be focused on what incentives are necessary to make small businesses hire and train significant numbers of people in a short period of time.

Additionally, Mr. Chairman, we believe an acceleration of social security payroll taxes is totally inconsistent with whatever Congress attempts to do to reduce unemployment. Payroll taxes are a tax on jobs--its that simple. They increase the cost of labor, hurt an already precarious cash-flow situation, and make it much more difficult for labor-intensive small business to hire the unemployed.

We support Senator Dole's attempt to increase the retirement age for social security. We believe the social security cost-of-living escalator should immediately become

the lesser of average wage increases or the increase in the Consumer Price Index. Finally, we will support reasonable amendments to the social security bill to reduce its tax-heavy approach by reducing out-year benefits increases.

In the area of non-tax legislation, enactment of the product liability tort law reform (S. 44) is a top priority of SBU. We urge you to review this bill and to cosponsor it. We believe it represents a well-thought-out, reasonable, constructive approach to reducing the manifold problems and uncertainties in the products liability area.

In the procurement area, SBU intends to work with a broad-based coalition of other small business organizations--most of whom are present this morning--to draft legislation to both increase the total procurement dollars being awarded to the for-profit sector, and to increase the percentage of those dollars that are awarded to the small business community as either prime or sub-contractors. Once this legislation is introduced, we hope this Committee will be assertive in seeking support on the Senate side and within the Administration for the two initiatives.

Finally, Mr. Chairman, we want to take this opportunity to publicly pat Jim Sanders on the back. We think he is doing a phenomenal job as SBA Administrator. We urge you and your Committee to support SBA's multi-faceted programs, all of which would make a major contribution to the nation's economic

recovery if only the Administration and the Congress will
give the green light.

Thank you.

* * * *

Chamber of Commerce of the United States of America

Washington

STATEMENT

on

LEGISLATIVE PRIORITIES

before the

SENATE SMALL BUSINESS COMMITTEE

for the

CHAMBER OF COMMERCE OF THE UNITED STATES

by

Christine Russell

February 25, 1983

I am Christine Russell, Legislative Counsel for the Small Business Center of the U.S. Chamber of Commerce. I am pleased to have the opportunity to present the Chamber's recommendations on small business legislative priorities.

The Chamber of Commerce of the United States is the largest federation of business and professional organizations in the world, and is the principal spokesman for the American business community. The U.S. Chamber represents more than 237,000 members, of which more than 233,000 are business firms, more than 2,700 are state and local chambers of commerce and more than 1,200 are trade and professional associations.

More than 90 percent of the Chamber's members are small business firms having fewer than 100 employees. Yet, virtually all of the nation's largest industrial and business concerns are also active members. We are particularly cognizant of the problems of smaller businesses, as well as issues facing the business community at large.

SUMMARY

Our small business legislative priorities for 1983 reflect the concern shared by all Americans for our country's sustained economic health. This program, advanced by the Chamber's Council of Small Business and endorsed by the Chamber's Board of Directors, is designed to speed economic recovery by stimulating new and expanded private-sector activities and by encouraging the federal government to spend within its means. Specific legislative proposals follow.

SOCIAL SECURITY

The Chamber of Commerce commends the National Commission on Social Security Reform for its conclusion that the fundamental structure of the social security system must be retained; for its diligent, bipartisan efforts in clarifying and offering proposals to solve urgent short term social security financing problems; and for the constructive contribution it has made in placing these issues before the Congress and the public.

The Commission acknowledges that its proposals do not entirely solve the long term problems in the system. Those should be addressed so that younger workers can have confidence in Social Security and our government's commitment to this important program. For the near term, further refinements can be made to assure that deficiencies are fully corrected and that emergency action is not again necessary in a few years. Most importantly, the burdens of the corrections must be shared equitably by employees, employers and retirees.

Among changes Congress should carefully consider are expanding the coverage of government employees toward a goal of full universal coverage; further adjustments of COLA formulas; a gradual increase in the normal retirement age; an adjustment of the rate by which benefits replace wages in the long term; and avoiding reliance on increased payroll taxes or general revenue financing.

American citizens need to have their government solve these massive problems in a manner which guarantees this vital system will continue to function in the future with fairness and integrity.

JOB DEVELOPMENT

Job creation and development are critical to our economic recovery. However, a sustained, healthy economy requires that these jobs be generated in the private sector. Small business has demonstrated its propensity for creating jobs that contribute to productivity and increase the nation's tax base. Federal work programs may temporarily reduce unemployment, but do not contribute to a healthy private sector and actually drain the federal treasury of taxpayers' dollars.

Our long term economic well being depends on Congress creating an environment in which the private sector can expand to offer permanent job opportunities for the nation's unemployed. In particular, Congress should:

- o Provide tax incentives that will encourage private-sector job creation, rather than developing public-sector jobs programs.
- o Simplify the federal procurement process and establish a definite policy of government reliance on the private sector -- when efficient and cost effective -- for the goods and services it needs.
- o Remove artificial government barriers to job creation by reevaluating minimum wage laws, repealing or revising Davis-Bacon and related laws, codifying recent OSHA administrative reforms, and reducing or eliminating regulatory barriers and burdens on small business.
- o Provide legislative incentives, such as reduced corporate tax and capital gains rates, to encourage small, labor-intensive firms to create new jobs.
- o Provide alternatives for small business participation in the export market.

OTHER ISSUES

A balanced budget should be the ultimate economic goal for Congress. Reducing the growth rate of government programs is a logical beginning. Congress should review all entitlement and defense programs and, where necessary, mandate maximum spending limits.

Finally, Congress must continue to work for an overall tax program that encourages growth of the small-business sector. (See attachment.)

CONCLUSION

Small business can provide the jobs, innovative ideas and competitive spirit this country needs to thrive economically. The U.S. Chamber recognizes the wealth of opportunity this sector of the business community offers.

Congress, too, must recognize small business' potential and pass laws that will help to realize that potential. These legislative proposals will give small business the incentive and the opportunity to put our unemployed back to work and will provide a framework for making this country solvent, once more. And these are goals we all can agree on.

SMALL BUSINESS TAX PROGRAM

1. CORPORATE RATES
Reduce corporate rates on the first \$500,000 of taxable income.
2. CAPITAL GAINS
The effective rate of tax on capital gains should be reduced in order to increase the availability of investment capital.
3. INVESTMENT TAX CREDIT FOR USED EQUIPMENT
The annual limitation for investment in used qualifying property for purposes of the investment tax credit should be increased to at least \$250,000.
4. INVENTORY SIMPLIFICATION
Further simplify the tax accounting for inventories by allowing a single pool of goods for small business and the use of exogenous indexes. In addition, the LIFO Recapture provision should be replaced.
5. MINIMUM ACCUMULATED EARNINGS
The minimum credit for earnings which may accumulate before any accumulated earnings tax would apply should be increased to at least \$500,000.
6. SUBCHAPTER S CORPORATIONS
Revise the Subchapter S provisions to make their use more widely available to small business, by, among other changes, increasing the maximum number of Subchapter S shareholders and expanding the categories of eligible shareholders.
7. CLOSELY HELD BUSINESS ROLLOVER
Permit the owners of a closely held business to defer tax on the sale of the equity of the business if the proceeds are reinvested within a specific time in other small business investments.

8. INDEPENDENT CONTRACTORS

A safe harbor provision should apply to individuals historically treated as independent contractors and a withholding tax should not be required.

9. DEBT-EQUITY

The debt-equity rules issued pursuant to Section 385 should be written to enable smaller firms to easily comply with the law.

10. DISC

Tax incentives such as DISC should be preserved and enhanced in order to foster small business exports.

11. GENERAL JOBS TAX CREDIT

Support the expansion of the targeted jobs tax credit to include a general jobs tax credit as preferable to public sector jobs legislation.

Statement of James T. Rogers, director of State Relations and acting director of Government Relations, National Restaurant Association, before the Senate Committee on Small Business, February 25, 1983.



**Policy Positions
of the
SMALL BUSINESS LEGISLATIVE COUNCIL**

*1981
97th Congress*

**Policy Positions
of the
SMALL BUSINESS LEGISLATIVE COUNCIL**

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EXPLANATORY NOTE

The associations that comprise the Small Business Legislative Council are eligible for membership in the Council by virtue of the fact that 70 percent of their dues income comes from domestic, independent small businesses.

Each of the associations presently enrolled in the Small Business Legislative Council has been provided with an opportunity to vote on the policy positions which follow.

The procedure by which any policy position is adopted begins with a vote by the Executive Committee of the Small Business Legislative Council. For the Executive Committee to adopt a policy position, an affirmative vote of 60 percent of the members of that committee must be recorded.

Once the Executive Committee has approved a policy position, the Small Business Legislative Council membership votes on it. As with an Executive Committee vote, an affirmative vote of 60 percent of the total membership must be recorded for a policy position to be adopted.

The policy positions contained herein have all been voted on and approved by this process (unless otherwise noted). Each has been approved by 60 percent, or more, of the member organizations in the Small Business Legislative Council.

For more information, contact Legislative Department; 202/296-7400

CATCH-UP GROWTH FOR SMALL BUSINESS

Numerically, the small business community occupies a predominant place in our economy, but these numbers alone have not reversed the trends within our economic system which continue to threaten the survival of small business.

Increasing market power by big conglomerates, continued oppressive federal regulatory policies, and aggressive labor organization have all joined forces to stagnate and retard the economic growth and prosperity of small business. These facts were recognized and emphasized in the 1978 hearings on the Future of Small Business in America, conducted by the House Small Business Subcommittee on Antitrust, Consumers and Employment.

In its final report (House Report No. 95-1810), the Committee stressed:

"We must recognize the necessity for major changes in our governmental policies—at both the Executive and Congressional levels—with regard to the preservation of competition and free enterprise . . . including a reformulation of Government policy on such matters as tax structure and industry regulation . . .

"Furthermore, policymakers should scrutinize the way in which the decline of small business is reflected toward increased economic concentration . . . In 1935, one percent of all U.S. corporations controlled 52 percent of all manufacturing assets and 4 percent of those corporations controlled 84 percent of the net profits. In 1974, .09 percent controlled 64 percent of all manufacturing assets and 2 percent of all U.S. corporations controlled 89 percent of the net profits. It is clear from such figures that eco-

nomic concentration remains a major obstacle to the creation of an economic climate in which small business can survive and thrive."

The Committee report concludes with this admonishment:

"Unless direct and concerted action is taken now, small business, the mainstay of a truly competitive system, will continue to decline. . . . Do the American people wish to preserve the foundations upon which our nation was built, or do they wish to acquiesce to the gradual spread of a system alien to the American spirit, a system of economic oligarchy?"

The 1980 report of the White House Conference on Small Business stated:

- Small business must play a larger role in national economic activity and should account for 50% of the Gross National Product by the end of the decade;
- Policymaking units such as the Economic Policy Group, the Federal Reserve Board, the Department of the Treasury, Congress, and the regulatory agencies should recognize that the small enterprises form a distinct economic structure within the national commerce and should develop distinct policy approaches for the Small Business Economy;
- Federal policy makers should adopt economic measures to fight inflation by encouraging Americans to save, invest and produce.

RESOLVED

Small business must regain its strength in our economy; its needs must be recognized as crucial to the survival of our private enterprise system. The Small Business Legislative Council urges the adoption of specific catch-up programs to enable faster growth for small business than in the past, but also accurate measurements of this development through increased market share, profits, innovations and employment.

ACHIEVING EFFECTIVE SMALL BUSINESS REPRESENTATION WITHIN GOVERNMENT

Over recent years, Congress has come to recognize that small businesses require different treatment than large corporations and other entities. To that end, small business requires full, fair, and independent representation at the highest levels within the U.S. government.

In establishing the Small Business Administration the Congress declared:

"The essence of the American economic system of private enterprise is free competition. Only through full and free competition can free markets, free entry into business, and opportunities for the expression and growth of personal initiative and individual judgment be assured. The preservation and expansion of such competition is basic not only to the economic well-being but to the security of this Nation. Such security and well-being cannot be realized unless the actual and potential capacity of small business is encouraged and developed."

The Small Business Administration is often reduced to providing "band-aids" for wounds inflicted by sister agencies or departments of the federal government. The SBA Administrator is not a member of the Cabinet, and is thus not included in the highest level policy determinations. The Administrator of the SBA is considered to be at the same level as an Assistant Secretary of a department.

In many cases, the SBA does not have sufficient funds to carry out its duties. Since 1958 Congress has added programs in a piecemeal method in its effort to solve small business problems as they arise or become apparent. The result: programs don't work efficiently; the agency is increasingly bogged down in its own growing bureaucracy; and more and more it has become a servant of the administration in power rather than an independent voice for its constituency, the small business community. In effect, SBA has be-

come a catch-all for politically-motivated programs.

A stronger SBA, while desirable, is not enough. Incremental additions to the SBA's authority and programs would merely continue the "patchwork" approach to small business that characterizes federal actions to this point. If small business is to get the recognition from Congress and other governmental agencies that it deserves, a complete reorganization of programs affecting small business is necessary. The creation and strengthening of the Office of Advocacy within the Small Business Administration is a step in the right direction.

It is clear that small business needs a *truly independent voice within government*, and it does not have this today. It is clear that Congress needs *independent* advice on probable impact of proposed legislation and regulation on the small business community. The Regulatory Flexibility Act of 1980 should help to accomplish this. It is clear that Congress needs independent advice on new legislation and programs that will stimulate and promote growth of the small business sector, and it does not have this today.

It is clear that current functional programs of the Small Business Administration could be transferred without any sacrifice of program efficiency to other existing departments and agencies of government. It is clear that public interest demands the restoration of small business to a truly competitive position in the marketplace to counter growing concentration. It is clear that the antitrust laws simply have not worked to achieve their purpose.

The time has come for a complete re-thinking of the government's role in fostering a vigorous competitive economy by utilizing the latent strength of the sector—small business—comprising 98 percent of the nation's businesses and generating 45 percent of the nation's economic activity.

RESOLVED

The Small Business Legislative Council urges Congressional hearings to study how best to achieve the most effective representation of the interests of small business within government. Such an analysis should include consideration of the establishment of a *truly* independent agency (an independence comparable to that of the Securities and Exchange Commission but without its regulatory authority) to represent small business within government. It should promote from the small business community *truly* vigorous competition to entrenched and concentrated industries, including oversight of the 1980 small business omnibus legislation which, among other provisions:

- required the President to report annually on the state of small business and the impact of Federal programs on small business and competition.
- required that SBA create and maintain a data base of small business economic information.
- establish/ a federal Small Business Economic Policy.

Consideration should also be given by Congress to transfer (from the FTC) to such an agency, of the Bureau of Competition (including Robinson-Patman Act enforcement) and the Bureau of Economics.

Because of the salutary track record of the House and Senate Small Business Committees, we urge that consideration be given by Congress to retention by such Small Business Committees of legislative authority over any new agency of government established to represent small business. We urge further that the House and Senate Small Business Committees' authority be retained over any existing programs of the Small Business Administration, regardless of whether such programs are continued under the Small Business Administration or transferred to other agencies of government.

EXECUTIVE REORGANIZATION OF THE SMALL BUSINESS ADMINISTRATION (SBA)

In a November 14, 1980, memorandum to President-elect, Reagan from his Small Business Issues Task Force the following was recommended:

"There should be an immediate and thorough review of the Small Business Administration and its programs, leading to an early decision on whether to retain the SBA in its present form. An alternative which should be carefully considered would be to incorporate the SBA within the Department of Commerce . . . In any event, all SBA loan programs should be thoroughly examined to determine if they can be transferred to the private sector."

RESOLVED

Any plan to change the SBA, to restructure the agencies involved with small business programs, is a matter of serious concern to small business. The Administration must provide opportunity for small business input before any reorganization takes place. Until there is assurance that small business interests will be effectively represented within the government, the status of SBA as presently structured should be continued.

TWO-TIER REGULATION

In the past few years the number of Federal regulatory agencies has grown, and so has the accompanying regulatory burden upon the private sector. Traditionally, government regulation has been applied equally to all companies across the board, without regard to the company size or impact on the economy. Statutory protection of the well-being of American citizens, while in many areas necessary, need not be the deterrent to economic progress it has become.

Small business is especially hard hit by excessive regulation, particularly when required to comply with regulations tailored to giant corporations. Unlike the larger companies, small business firms often haven't the time, personnel or expertise to meet the requirements of federal regulations. The small business owner wears many hats in the day-to-day operation of his business—the time and resources spent meeting often-frivolous government policy objectives erodes his effectiveness as a manager, his competitive stance, and his place in the local economy.

For these reasons, a flexible, tiered regulatory system has been adopted by Congress. When General

Motors and Joe's Machine Shop are required to meet the same government standards, they are not being treated equally or fairly. With respect to both substance and procedure, small business should in every case bear a different compliance burden.

Since so many regulations have come into effect in an effort to control the practices of the largest companies, small business should not continue to suffer from entanglement in the regulatory net; the social benefits of applying regulations to small firms are always diluted. Small business is different in terms of its ability to comply and also in its economic impact on the community. These facts should be recognized by the Congress and the regulatory agencies of the government by implementing flexibility in regulations, thereby leading to a reduction in paperwork and compliance burdens borne by small business.

Achieving this goal will require vigorous Congressional oversight of the implementation of the Regulatory Flexibility Act. Federal agencies must be required to comply with both the letter and the spirit of this landmark law.

RESOLVED

The Small Business Legislative Council urges the aggressive enforcement of a flexible, multi-tiered system of regulation, as mandated by Congress in 1980, in order to equalize the compliance burden of all companies. Congress should oversee the enforcement of flexible regulation and rules, and in addition, seek other legislative remedies, such as tax incentives to spur compliance.

COST JUSTIFICATION FOR REGULATIONS

Excessive government regulation is a significant inflationary factor. In fiscal 1979, the aggregate cost of government regulation was expected to reach \$102.7 billion, a 30 percent increase over fiscal 1978 estimated cost of \$79.1 billion.

The cost of complying with government regulations has been estimated at \$3,600 per year for every small business in the land. Most small firms are experiencing inordinate amounts of financial and managerial problems in their attempts to comply with the proliferation of regulations generated by federal agencies.

The time and energy spent on federal paperwork, and the large capital expenditures required to meet environmental standards, job safety standards or other mandatory standards can be a matter of life or death for a small business. The inability of a small business to finance the cost of mandatory compliance is reflected in the higher direct costs a small business incurs.

The Administration is attempting to deal with this problem by means of Executive Order.

Many pieces of legislation have been introduced to remedy the situation, but in many cases these bills are too narrowly drafted and apply only to the independent regulatory agencies and do not cover the Executive branch. One exception is the Paperwork Reduction Act of 1980.

Another remedy can be found in the Regulatory Flexibility Act of 1980. This law requires federal agencies to study the impact of proposed rules on small business prior to publication of new regulations

RESOLVED

The Small Business Legislative Council urges passage of broad based legislation to reform the regulatory system, by way of imposing cost justification requirements upon the regulators prior to implementation of regulations, and recommends that the same requirements be placed upon the legislative process.

SUNSET LAWS

Once created, regulatory agencies tend to be self-perpetuating—promulgating more regulations, seeking rulings or test cases against smaller firms before seeking out the bigs, and generally trying always to improve their own prestige and “batting averages” before Congress in order to secure larger appropriations for the following years.

Sunset laws would enforce periodic reassessment of the need for government programs and agencies and require concrete justification for their continuance beyond a certain date.

Sunset would be a useful means by which it could be determined if regulations overlapped, conflicted or were unnecessary. Priorities and circumstances change: with a sunset review procedure, regulations no longer needed or proving to be unworkable could be deleted. This would lead to a reduction in federal spending. With fewer regulations and/or agencies, perhaps there would arise a better co-operation between the various agencies and a better implementation of federal programs.

Sunset would make Congress accountable for the regulations issued by an agency. This should lead to more concise drafting of legislation, rather than Congress setting out a broad outline of policy which is interpreted and implemented by the agencies. In essence, sunset would mandate legislative oversight of on-going government activities. This would also make it necessary to have a compilation of existing programs—such a listing is practically impossible to obtain as matters stand now.

The proliferation of agency rules and regulations has increased at an alarming rate in recent years. The effect of these regulations is to overburden the small business owner. Is it not time to review such programs if the economic effect is forcing American small businesses out of business?

RESOLVED

The Small Business Legislative Council urges the passage of legislation creating sunset provisions and Congressional review of the effectiveness of existing programs in all cases. Regulations have dealt a heavy financial blow to the small business community. Sunset provisions can aid small business' recovery.

PAYMENT OF ATTORNEYS' FEES

Federal regulation of the private sector has burdened small business in particular with paperwork, increasing costs, and general frustration with seemingly frivolous regulations and guidelines. More importantly, though, the small business community has found itself the object of increasing abuse by regulatory agencies which use their statutory authority to seek rulings against small firms which, unlike the large corporations, haven't adequate resources to sustain a protracted legal battle with the government. This statutory abuse by certain agencies not only establishes precedents for rulings against larger firms, but builds the "batting averages" of the agency to justify its very existence and additional appropriations from Congress. Thus, the agency, its staff, and the regulatory process are further entrenched in the government.

A decision, right or wrong, by an official of the regulatory agency has caused more than just a few companies to go out of business. And even if the ruling has been proven wrong, a bankrupt company has no recourse to suing the government or righting the case through the appellate procedures—it simply cannot afford the cost.

The Equal Access to Justice Act of 1980 provides redress for small business. It is imperative that this legislation be implemented to the fullest degree possible, with the Small Business Committees of the House and Senate assuming an oversight function.

RESOLVED

The Small Business Legislative Council believes that legislation providing for the payment of attorneys' fees to individuals and small businesses prevailing in civil or administrative cases against the federal government was a first step toward restraining arbitrary regulatory proceedings. Since many cases result in a bureaucratic or administrative denial of justice to those unable to afford the extraordinary legal costs involved, the legislation providing for attorney fee reimbursement can restore to those abused their right to seek legal redress for damages done.

Model implementation regulations of the Equal Access to Justice Act should be drafted only after Congressional hearings, with extensive input from federal agencies and the private sector.

CURBING REGULATORY ABUSE BY CONGRESSIONAL VETO

As part of its oversight function, Congress has the duty to determine whether the agencies it has created are issuing rules and regulations contrary to law, inconsistent with legislative intent, and going beyond the statute it is supposed to implement.

When an agency does commit abuse, the damage to small business subject to such rule or regulation may be irrevocable. Therefore a review period of 60 days or longer is essential.

Here are some of the reasons why Congress should exercise veto power over proposed regulations:

- In spite of the fact that the Congress of the United States has ordered the FTC to afford opportunity for oral presentations to all parties desiring to testify in Rulemaking proceedings (P.L. 93-636), the Commission continually ignores the law.
- In another area, the FTC allows staff reports, assumably stating facts, to be entered into the Rulemaking record, yet refuses to allow those staff members to be cross-examined concerning those statements. This practice is being carried on despite a clear legislative imperative opposing the practice (*Cong. Record*, December 19, 1974, pp.41405-41408).
- The Magnuson-Moss FTC Improvement Act authorized the FTC to designate those acts or practices which would be henceforth deemed unfair or deceptive on an industry-by-industry basis.

There are now many Rulemaking proceedings being conducted by the FTC in various stages of completion. Uniformly, these Rulemaking proceedings are directed at small business and its customers. The impact of these Rules when enacted will create unfair

and unnecessary economic hardships to countless small business enterprises which lack the resources to represent themselves effectively against the institutional attack that tends to undermine their very existence. Congress has warned the Commission concerning this very eventuality, and had built into the text of the law a requirement that the FTC promulgate a "statement as to the economic effect of the rule, taking into account as to the economic effect on small business and consumers." This statement of the competitive impact of the proposed Rule on small scale enterprise should be made when the promulgation of the Rule is initially proposed. Such competitive impact statements should also be subject to administrative fact finding and require a full opportunity for judicial review as an essential pre-condition to the adoption of such a Rule.

The need for overseeing the bureaucracy and its regulatory activities and for action to curb abuses of such activities is widely recognized. President Carter named a Regulatory Council for the express purpose of reforming regulatory procedures, and eliminating areas of duplication, overlap and inconsistency. President Reagan has continued and expanded this effort.

However, more needs to be done. The Regulatory group, Chaired by Vice President Bush, is composed of representatives of the Executive branch regulatory agencies and departments, but has no authority, power or relevancy to the regulatory activities of the independent regulatory agencies which are not a part of the Executive branch of the government, and are not subject to oversight, supervision or direction from the President or any of the departments under his control. Consequently these independent regulatory agencies, as arms of the Congress, have only one overseer: The Congress.

RESOLVED

Small Business Legislative Council supports, IN PRINCIPLE, the establishment of a uniform procedure for Congressional review of the activities and regulations of "independent regulatory" agencies (those agencies which are not in the Executive branch but are arms of Congress, such as the ICC, FTC, FCC, SEC, CAB, and FRB) which may be contrary to law or inconsistent with Congressional intent, and permitting either the House of Representatives or the Senate to prevent an objectionable regulation from going into effect by passage of a simple regulation.

AGENCY FOR CONSUMER ADVOCACY

Since 1967, legislation to establish a consumer agency has been introduced in every session of Congress. By whatever name, we may expect to see yet another version introduced in the 97th Congress. From past experience, it is likely the new legislation would again contain elements granting a consumer agency powers to intervene in proceedings before other agencies, thus leading to further litigation. The indirect control thus assigned a consumer agency through litigation, issuing of subpoenas and interrogatories, and of course, additional paperwork, would give unprecedented power to an agency which is supposed to have no independent regulatory power.

Small businesses would not have the resources to combat this force—they are already the targets of other regulatory agencies which find it easier to go after the "smalls" rather than the "biggs." Exempting small businesses would not necessarily alleviate the problem as they would then find themselves "caught in the middle." There is also the fear of an unfounded charge against a business being made public while those making the charge could remain anonymous. A small business could easily be wiped out on the basis of an unsubstantiated charge which could very well have been made by a competitor—as with all things, it would be the initial charge which would be remembered by the consuming public, regardless of the outcome.

In essence, a bureaucracy would be established which would decide what is best for consumers, then dictate to industry what can be manufactured, to what specifications, and at what cost. There no longer would be any freedom of choice for consumers nor freedom of the marketplace to develop new products and services.

While the public does need protection against unscrupulous business firms, in turn, honest firms deserve protection from over-zealous consumer activists. The Small Business Legislative Council questions whether the best way to remedy the situation is through the promotion of an atmosphere of suspicion and hostility toward business which would all but destroy free enterprise. It could, in the end, make consumers wary of virtually all the merchandise they buy. Consumer demands can be met by reputable manufacturers who charge a fair price for a product as advertised. The private enterprise system on the whole has served the consumer well by providing new and needed products at affordable prices.

Finally, it is a complete fallacy to believe that a single agency in Washington could solve the problems of more than 200 million individual consumers or to believe that such an agency would actually give consumers a true voice in government decision-making processes.

RESOLVED

The Small Business Legislative Council opposes the establishment of any agency purporting to represent consumers and having the power to intervene in proceedings before other federal agencies and in the courts. SBLC does support a more adequate functioning of consumer interest sections in existing agencies. SBLC decries attempts at placating small businesses by any "so-called" exemptions. By Executive Order, the President's Consumer Advisor has been granted oversight authority over consumer programs in all agencies of government, thus negating the need for a separate agency.

EXPEDITING HEARINGS ON AGENCY RULINGS

Administrative orders, citations and fines affecting small business have increased in number and widened in scope in recent years. Contesting such orders can deplete the resources of a small company. Rapid Administrative review is needed where the sum in controversy is small and the decision requires review of fact-finding rather than the invalidation of a statute, rule or regulation.

Senator Mathias (R-MD) has succinctly outlined the situation confronting the small business:

"When confronted with a federal order, a citation or fine considered unjustified or inequitable, a business generally has two avenues of redress. It can appeal to the administrative agency or it can take the matter to a Federal court. Regrettably, in many of these instances, neither of these options offer an expedient resolution.

"If the small business owner decides to appeal to the administrative agency, he faces a difficult and burdensome task. First, if he cannot afford

to send someone to Washington or to a regional office to present the case verbally . . . he must rely on a written appeal. Too often, under (this procedure) important questions go unanswered or significant details are left unexplained, working to the disadvantage of the business owner. Further . . . this method . . . pits one agency employee's decision against another's

"If the small business owner decides to appeal to the Federal court, the cost of such appeal (is) likely (to) be greater than the fine involved. In addition, given the usual length of time between filing and decision, the prolonged frustration (and the expense and costs of this route) far outweighs the benefits. Small business owners often choose not to go to court, thereby waiving their rights to review."

What is needed is easy access to district courts for a quick magisterial review of agency rulings with the decision being final and not reviewable by any court or Agency.

RESOLVED

The Small Business Legislative Council supports legislation authorizing a small business to petition a district court for a magistrate to review a fine, citation or order of an Agency within 30 days of the ruling, where the direct dollar value of such fine, citation or order, or any part thereof, is \$2,500 or less and such review does not require invalidation of statute. If the magistrate determines that the citation, order or fine is inappropriate to the alleged offense, inconsistent with previous interpretation of pertinent regulations or inequitable, he may order the Agency to rescind or modify the citation, order or fine. Where a small business has petitioned a district court for a magistrate to conduct pending proceedings, the fine, citation or order shall not be enforceable until a decision has been rendered, except when failure to enforce the fine, citation or order would result in imminent danger to the health or safety of any person.

PAPERWORK MANAGEMENT

It has become an axiom in business and government that the current atmosphere of regulation and attendant paperwork places an extreme burden on business and individuals, and on the American economy. It has been estimated that the cost of regulatory compliance is more than \$100 billion annually, and that the cost of completing the paperwork associated with this compliance is, for the business community, some \$32 billion per year.

The cost of paperwork could be reduced somewhat by the federal, state, and local agencies coordinating their requests, thus eliminating overlapping and duplication of information. A major recommendation by the Commission on Federal Paperwork was that federal forms should be consolidated and that each agency should use existing data whenever possible, including that collected by other agencies. In one study a small business owner reported he was required to complete 268 forms *each month*.

The Commission on Federal Paperwork in its final report of October 3, 1977, pointed out that the economic burdens of government paperwork extended beyond the cost of filling in the blanks on the forms. The Commission observed that the costs included recordkeeping systems, and the use of outside professional and legal assistance which can drive the cost far beyond \$15 per hour, and the indirect costs of delaying other important work to meet deadlines

on the paperwork.

The Commission estimated that American business spent as much as \$32 billion each year completing federal forms, and the government spent another \$43 billion processing them. It estimated that the 10,000 largest companies in this country, many of which were actually considered small businesses, spent \$10 to \$12 billion annually, averaging over \$1 million each. In addition, the report observed, 5 million domestic small businesses spent \$15 to \$20 billion annually on government paperwork, at an average cost of \$3,000.

This figure, though, may only be the tip of the iceberg. The 5 million small businesses cited in the report of the Commission on Federal Paperwork are those cited in the 1970 Census. The Small Business Legislative Council, though, has documented tax filings from more than 13 million small businesses. Thus, if the average cost to a small business remains \$3,000 each, the cost to small business of government paperwork is a staggering \$39 billion each year. This makes the \$100 billion a reasonable estimate. If the money now going into completing forms could be put to productive use or in reducing product costs to consumers, the SBLC believes that the reduction in the rate of inflation would be significant. SBLC endorses in principle Paperwork Management concepts advanced by the Business Advisory Council on Federal Reports.

RESOLVED

In order to develop and provide for adequate control of federal paperwork, and to insure that such paperwork is necessary, that the information collected is meaningful and utilized, and that it is collected with a practical minimum of cost and burden, the Paperwork Reduction Act of 1980 must be implemented by the federal government which will embody these concepts of "Paperwork Management."

1. All reporting activities require some recordkeeping, and all such activities, whether for regulatory or statistical purposes, are based upon and result from legislative actions and regulations demanded or spawned by such legislation.

All parts of the federal government must therefore recognize that in the development of any solution to the paperwork problem there is an inherent interrelationship and interdependency among

the REGULATION, RECORDKEEPING AND REPORTING aspects of paperwork.

2. Because all paperwork stems from actions taken by or directions or authority created by the Congress, an assessment of impact must be a part of the legislative process.

- Any legislation embodying regulatory or data-collection authority or direction should require a PAPERWORK IMPACT assessment prior to enactment.
- The paperwork impact statement preparation should be assigned to the agency to which authority will be delegated, with adequate time and opportunity for comment and evaluation by the affected parties and the General Accounting Office, with oversight by the Office of Management and Budget.

—continued—

- The paperwork impact statement thus generated should be provided to the legislative committee involved prior to committee markup, and should become part of the legislative history of the bill, when enacted.

3. It is essential that the regulation, recordkeeping and reporting activities be an integral part of the planning program management aspects of government. The government-wide accountability for paperwork management and control therefore demands that this function be located within the Executive Office of the President as provided for in the Paperwork Reduction Act, P.L. 96-511.

Paperwork Management should be located in the Office of Management and Budget (OMB) as provided in P.L. 96-511.

4. All Executive Branch agencies and departments, and all independent regulatory agencies and other agencies of the federal government, except within the legislative branch, must have approval and clearance by OMB of recordkeeping and reporting requirements on persons outside the federal government, as stipulated in P.L. 96-511.

5. Actions by agencies submitting materials for clearance shall include the following procedures:

- a. Any recordkeeping or reporting requirements should be submitted, in the proposed form, for public comment, by publication in the FEDERAL REGISTER.
- b. Proposed regulations and reporting forms thus published should provide for a comment period of at least 60 days (90 days where possible.)
- c. At the end of the comment period, the agency should publish in the FEDERAL REGISTER a summary of the comments received and the agency's response.
- d. Proposals for data collection or reporting requirements should be checked, for possible duplication, using as a management tool a federal information locator system, as required in P.L. 96-511.

6. Actions by OMB required by P.L. 96-511 include:

- a. Avoidance of duplication, development and establishment of "protected enclaves" for data elements, which will provide for interchange of data subject to confidentiality and privacy safeguards.
- b. Assumption of the direction and management of an information and locator system, with provision for operating details to provide maximum usefulness.
- c. Development of more definitive measures and estimates of respondent burden and costs, e.g., by obtaining voluntary respondent input regarding new or revised operations necessary for compliance, changes and additions to record-keeping, costs of data-gathering, etc.

7. Independent Regulatory agencies are, under P.L. 96-511, permitted to over-ride OMB recommendations or disapprovals or constraints, providing such action is performed in a "public" manner, such as through hearings or actions of the agency's commission or board, and the reasons therefor are published in the FEDERAL REGISTER.

8. The new legislation establishing or involving new regulatory, recordkeeping and reporting activities should be subject to oversight by the appropriate Congressional committee after 18 months from the time of enactment, in order to ascertain:

- a. whether the initial impact assessment has been exceeded;
- b. whether the scope, burden and cost of the regulations and of the recordkeeping and reporting is in compliance with the Congressional intent; and,
- c. whether implementation of the legislation has resulted in practical utility, and if it should be modified or rescinded.

9. Legislation for new programs which require, provide for, or engender new paperwork costs or burdens should expire automatically in 5 years from date of enactment, unless a longer or shorter period has been specifically set forth in the original legislation, or unless its continuance has been extended for an additional period by a subsequent act of Congress.

LOBBY DISCLOSURE

Congress has for many years considered various legislative proposals aimed at monitoring, controlling and/or limiting lobbying activities by individuals or organizations. Despite a lack of justification of the need for this legislation, it has received serious attention in several recent Congresses.

All proposals advanced to date pose serious moral questions for all Americans and serious problems in particular for organizations representing small business.

The right of everyone to petition the government is guaranteed by the First Amendment. This right is every bit as applicable to the organizations which petition on behalf of these individuals. Any infringement on that right is an infringement of the First Amendment.

All legislation proposed thus far would create substantial recordkeeping and reporting requirements. While these requirements would be a nuisance for all organizations, they are an unconscionable

burden for small business organizations.

The legislative staff of small business organizations is usually small, often one individual. Time spent maintaining and filing records is time taken away from that organization's right to serve its members' legislative needs. Their time is already at a premium because there is just as much legislation affecting small business and labor. Recordkeeping requirements may force additional accounting and administrative requirements on organizations not possessing sophistication in either area.

Despite this, the burden of recordkeeping and potential penalties (criminal or civil) are just as great for small organizations as for large. Small organizations would be easy targets for big government attempts to take advantage of their limited financial resources. Unable to afford prolonged legal defense, they would be vulnerable as quick and easy examples. And the results of civil penalties or criminal convictions could easily destroy a small business organization.

RESOLVED

Restrictive lobbying legislation is inherently inimical to the First Amendment. In addition, it is discriminatory against small business organizations and any other group with limited lobbying activities. By mandating the same degree of recordkeeping and penalties, it makes smaller organizations with fewer resources more vulnerable to arbitrary prosecution.

Ideally, any such legislation should be defeated as an unconstitutional infringement of the First Amendment. Alternatively, a minimum action level of \$100,000 per year (not including salaries or legal fees) on lobbying communications should be invoked to deter discriminatory action against organizations with limited lobbying activities.

GRADUATED BUSINESS TAX SYSTEM.

The graduated corporate income tax originally advanced by SBLC was enacted in 1978. It provides for a tax on the first \$100,000 of taxable income according to the following schedule:

0 - \$ 25,000	— 17%
\$25,001 - 50,000	— 20%
\$50,001 - 75,000	— 30%
\$75,001 - 100,000	— 40%
Over - 100,000	— 46%

This was an historic step. Given the difficulty small businesses face in raising capital for investment (compared to the ready access to the capital markets enjoyed by the largest corporations), these lower tax rates made it somewhat easier for small companies to re-invest more of their earnings into expansion and improvement.

Small business still faces many tax law obstacles. Estate and gift taxes are particularly burdensome; businesses shouldn't be forced into the arms of corporate takeover or driven out of business entirely due to excessively heavy taxes at the time of transfer of assets within an estate or family business. Among the most afflicted groups of small business falling into this category are farms—truly small, family owned businesses.

Depreciation simplification is also backed by the small business community. The current ADR (Asset Depreciation Range) system is far too complex to be effectively utilized by most small businesses. The need for a simplified, straight-line depreciation system has long been recognized by the small business community, and was supported in the 96th Congress. The need persists, and small business must continue to back the needed changes, provided that small business is given its fair share of any business tax reductions.

RESOLVED

The Small Business Legislative Council continues to urge expansion and further simplification of the graduated business tax system, including investment tax credits, capital gains taxes, estate and gift taxes, and depreciation allowances. The SBLC, recognizing the gains made in the 95th Congress in the adoption of the graduated business tax system, continues to urge further reduction of the minimum rate of corporate taxation to 12 percent, as well as a widening of the brackets to which the graduated rates apply. At a minimum the present \$100,000 cut-off point should be increased as a first step to \$250,000.

TRANSFER OF SMALL BUSINESS OWNERSHIP

Small business represents the key ingredient in maintaining competition and offering consumers a market place choice.

This balance can be jeopardized when a small entrepreneur is unable to sell and perpetuate his business because otherwise qualified buyers may not be able to obtain, through present commercial sources, sufficient financing to acquire the business.

P.L. 96-302 established a loan guarantee program, whereby qualified buyers, including employees of the firm, could purchase a company which otherwise might be forced to close, liquidate, transfer, or merge with a larger firm.

Adequate financing is available from a seller if the seller holds a long-term note. However, in many cases this note is the primary asset of the seller and may constitute the sole retirement program of the seller. The availability of a loan guarantee to the seller of a business who is willing to hold an installment note for a long-term payout would greatly expand opportunities for small business to be sold as going enterprises to qualified buyers. Such loan guarantees protecting the seller of a business who holds the long-term contract could be at a lower level than the present 90% guarantee when banks are involved. In fact, somewhat greater exposure of a seller would provide an incentive to insure that cooperation and guidance is available to the buyer.

RESOLVED

Congress is urged to maintain the funding vehicle through SBA to enable small business sale agreements to obtain a federal guarantee of the note held by the seller when given by qualified buyers.

The SBLC recommends that a guarantee program be continued under which loan packaging and loan review boards, in cooperation with the banking community, be established within each Standard Industrial Code (SIC) grouping, funded by the respective industry and operated according to standards established by statute or regulations of an existing agency of government.

In this way a long guarantee, as part of a buy-out transaction, would be reviewed by individuals within the industry, packaged by a lender, and then presented to the appropriate agency of government whose primary responsibility would be to insure that all information is properly assembled and the agency's requirements are met. Servicing of the loan would then be the responsibility of the institution, operating in much the same manner as in any loan.

Existence of a program as outlined above would:

1. Encourage transfer of existing businesses which have a much greater potential for survival than do newly created businesses.
2. Relieve demand pressure on the money market by having the seller carry a long-term note.
3. Assure employees of job continuation.
4. Make careers in Small Business more attractive for younger people who would be willing to forsake higher short-term earnings when presented with an opportunity for ownership without the need of amassing large amounts of capital normally necessary for a business buy-out.

JOB CREATION TAX CREDITS

The 95th Congress refused to extend or expand a job creation tax credit which allowed a business to take a tax credit of 50 percent of the cost of hiring up to two new employees with a maximum credit of \$20,000. Instead, Congress created a new targeted jobs credit and extended and expanded the Work Incentive (WIN) program.

Under the new targeted credit, a tax credit of 50 percent of the first \$6,000 of wages per employee in a trade or business for the first year of employment, and 25 percent of such wages for the second year of employment, would be provided for hiring members of seven specific groups that have unemployment rates above the national average. The ordinary tax deduction for wages would be reduced by the amount of the credit. Wages eligible for the credit would be limited to 30 percent of the total FUTA wages paid

by an employer.

The current WIN tax credit for hiring welfare recipients would be increased so that rates for hiring a business employee are the same as for the targeted jobs credit. The rate for hiring a non-business employee would be 35 percent of the first \$6,000 of wages for the first year of employment.

As signed, the Humphrey-Hawkins bill was a far cry from the massive federal jobs and economic planning bill introduced by the late Senator Humphrey and Rep. Hawkins during the mid-1970s recession. But it retained the central goal of reductions of the unemployment rate to 4 percent by 1983. In addition, the final version tied a new national goal, a reduction of the inflation rate to 3 percent by 1983 and zero percent by 1988, to its unemployment goal.

RESOLVED

In the elimination of current high unemployment, the small business sector should be the employer of the first resort, with the incentive being provided by a job creation tax credit without regard to the status of the individual.

TAX STATUS OF INDEPENDENT CONTRACTORS

The IRS has initiated a campaign to alter the tax status of small businesspersons filing as independent contractors.

Despite repeated defeats in the courts and sharp criticism from the General Accounting Office, the IRS has increased pressure for changes in the basic make-up of the industries utilizing this status—that is, the reclassification of independent contractors from small businesspersons to employees of corporations. The major motivations of the IRS in justifying reclassification appear to be a desire to correct alleged under-reporting of income by independent contractors, to bolster the Social Security trust fund by changing from a SECA payment system to a FICA system, and to provide unemployment compensation to these individuals.

The Treasury Department has seen fit to support the IRS position and has considered radically revamping

the requirements one must meet to be classified as an independent businessperson to avoid tax withholding paperwork burdens not presently levied. These proposed changes, if adopted by Congress, could effectively eliminate millions of small business careers throughout the nation, and tamper with a link in the marketing-process that could radically alter the flow of goods and services to the consumer.

The Revenue Act of 1978, and a subsequent extension in the 96th Congress, provided interim relief from employment tax liability to taxpayers involved in employment tax status controversies. Eligible taxpayers are relieved of all liability for federal income tax withholding, Social Security (FICA) taxes, and unemployment (FUTA) taxes with respect to their workers for any period ending before January 1, 1979, provided the taxpayers had a reasonable basis for not treating the workers as employees.

RESOLVED

The movement of goods dependent on the perpetuation of the independent contractor status is integral to our economy and such status is essential if individual entrepreneurship and smallbusiness is to flourish in the country. The reclassification of independent contractors as employees would be anti-small business, with an adverse effect on the job market, as well as causing an adverse effect on anti-inflation efforts by increasing costs of doing business and reducing competition. We support a legislative initiative to permanently implement recommendations of the Conference Report on the Tax Reform Act of 1976, prohibiting the IRS from applying any new or changed position in this area, inconsistent with a general audit position, regulation, or ruling in effect on January 1, 1976.

PRODUCT LIABILITY INSURANCE

For a number of years small businesses have been experiencing major difficulties in the area of product liability insurance because of escalating costs for adequate coverage and, in many instances, refusal by the insurance companies to issue any type of product liability insurance coverage. This situation exists even for companies which have never had a claim filed against them.

Although manufacturers may be hit the hardest, the problem also exists for distributors and retailers. Manufacturers may be forced to delay the introduction of new products and distributors may find retailers are unwilling to stock products without proof of coverage, which may result in firms reducing their product lines or going out of business and adding to the unemployment rolls.

Added to the problem for manufacturers is the fact they may be sued for equipment over whose use they have no control. Nor can they exercise any control over subsequent alterations to the equipment they have manufactured once it leaves their ownership. Yet, they, as original manufacturers, are the ones who can be sued by *injured* employees of companies to whom they supply the equipment—*employees whose injuries probably have already been compensated under state Workers' Compensation awards*. There has also grown over the years an increasing tendency on the part of consumers to sue. This has led to greatly-inflated monetary awards being demanded which companies have to carry on their books as a contingent liability until the case has been settled. A survey conducted by the National Small Business Association showed there was a vast difference between the inflated amounts being demanded and the actual amounts awarded.

Various proposals have been made in an attempt to achieve a solution to this problem: reform of the tort

system; limitations on the size of court awards; and time limits on the manufacturer's liability after the product or equipment is put on the market. Although a long-term solution is most desirable, it is imperative that there be additional short-term relief to help small businesses which are suffering now. The Revenue Act of 1978 contains a first step to alleviating this existing problem. Product liability losses, incurred in taxable years beginning after September 30, 1979, may be carried back 10 years instead of 3—if not fully utilized, the loss is then available as a carryforward for the succeeding 7 years. This law also allows for the accumulation of reasonable amounts to pay for future product liability losses. However, amounts cannot be set-aside in a tax-exempt trust fund, as would have been the case in the Product Liability Insurance Tax Equity (PLITE) legislation, which would have allowed companies and professionals business deductions for payments made into a reserve fund where the funds would be deductible as a business expense and tax-exempt while they remained in the trust.

Another legislative proposal, which would have granted immediate relief, would have allowed reinsurance to be offered which would protect the insurance company's reserves from excessive losses and thus result in lower premiums and more availability. Still another viable proposal is encompassed in the Product Liability Risk Retention Act which will permit small companies, who are unable to obtain affordable product liability insurance or who have large deductibles, to pool all or part of their product liability risk in risk retention groups. Thus, small companies, through this pooling arrangement, would find this self-insurance practical for the first time. They would also benefit from lower costs since insurance company profits and overhead would be eliminated.

RESOLVED

The Small Business Legislative Council supports the concepts as outlined above and will urge adoption of such measures by the Congress, recognizing however, the advisability of pursuing other legislative remedies which will provide a more satisfactory long-term solution to the overall product liability problem.

CAPITAL INVESTMENT RECOVERY

Small business has seen its role in the U.S. economy dwindle for decades. Much of the reason for its decline lies in its inability to get the capital to be able to compete with large business in this country. The corporate giants, meanwhile, have access to the capital they need at the lowest available rates. They continue to increase their share of the Gross National Product at the expense of small business.

This competitive country must redirect its economic structure to return to the principles of private enterprise upon which it was founded. At the rate we are going there will soon be no small business in America. The American dream of starting one's own business and making it a success will be nothing more than a dream. No one man or woman will be able to come close to competing with the major corporations.

The U.S. Congress can help restore the American dream by passing legislation facilitating the recovery of capital. But it must be of genuine help for the small business and not a tool for big business to continue to take over and freeze out small business as it has been doing for years. The corporate giants, with their easy access to capital at the lowest rates, would use any legislation to accelerate expansion to the disadvantage of small business if there is not a ceiling on the benefits. The small retailer would get little joy from his newly won benefits if he found a major corporate chain was using them to open a store next door. This would happen without a ceiling. The small manufacturer would find the same thing. Whatever he was able to invest in new productive equipment would be more than matched by the well-heeled giant

that had been running him out of business anyway. In some industries, major corporations who presently subcontract would find it a greater advantage to manufacture themselves should legislation without a ceiling be passed.

Any tax bill accelerating depreciation should provide a 10% investment tax credit for all equipment, machinery, and furnishings. It would allow them to be depreciated over four years. This type of capital investment could be depreciated as much as four or five times faster than presently allowed. These incentives would be targeted to small business by limiting to \$1 million the amount of total investment in equipment, machinery and furnishings upon which accelerated depreciation would be allowed.

Buildings and fixtures would also be depreciated much faster. These types of investments could be written off in 10 years. This type of investment could be depreciated as much as six times faster than under present rules. This depreciation reform would also be targeted to small business by limiting to \$1 million per year the amount of investment in buildings and fixtures upon which accelerated depreciation would be allowed.

Over 97-1/2% of all U.S. companies would be able to use this legislation to full advantage. Most of the remaining 2-1/2% of companies, which account for 79% of the investment in this country, could use it up to the ceiling amount. Thus, depreciation simplification and reform would help small business and significantly reduce the revenue loss that would occur if there were no ceilings on benefits.

RESOLVED

Increased capital investment by small business is essential if this basic American institution is to survive and prosper. SELC endorses legislation that will encourage increased capital investment by small businesses. The combined effect of more rapid depreciation and increased investment tax credit will assure small business a greater return on its investment in such capital, thereby making small business more profitable, and better able to compete in all markets.

INVESTMENT TAX CREDIT

The decline in our productivity is caused by several conditions. For the first time in twenty years, the Joint Economic Committee Annual Report of 1979 unanimously concluded that an increase in productivity is vital to the improvement of our economic standard of living and to the reduction of inflation. A partial cause of this situation is the antiquated production facilities of many American manufacturers. Another partial cause is the utilization of inefficient equipment; and yet another partial cause is the overall age of our country's industrial machinery. The most recent U.S. survey of machine tools shows only 11% of the industrial machinery in use today is less than five years old; 76% is at least ten years old. Equipment renewal and upgrading are necessary in both large and small manufacturing companies. Increasing productivity through equipment renewal is best achieved for small business through the purchase of affordable used machinery and equipment.

Under present law there is a \$100,000 limitation on the amount of used equipment eligible for investment tax credit, but there is no limitation on the investment credit available for new equipment. This discriminatory tax treatment impacts directly and primarily on small business which is already hindered by

its inability to externally or internally generate capital necessary to buy new equipment.

In order to increase productivity and competition, the discriminatory ceiling on the amount of used property eligible for a tax credit must be eliminated; and, the carryover provisions available for new property must also be available for similarly situated used property. Traditionally, small businesses purchase used capital equipment; large businesses basically purchase newly manufactured capital equipment. The cost of obtaining capital for production equipment is high for everyone, especially those who cannot borrow at the prime rate.

Firms purchasing used capital equipment do not have a chance to offset some of their costs through this tax credit. Confining the investment credit to only equipment with the latest technology helps primarily the largest enterprises and basically ignores the numerically greater small business segment of our economy which needs this tax credit the most. Because the small business sector offers the greatest potential for increasing employment, there is normally a direct relationship between increased installation of used machinery and increased employment.

RESOLVED

Small Business Legislative Council urges and supports changes in the IRS Code to allow a full investment tax credit for used machinery and equipment. This full investment tax credit will allow small businesses to receive the same tax incentive provided to big businesses and would allow small businesses to compete, to maintain their current market share, and to hopefully expand output and productivity.

SMALL BUSINESS PARTICIPATING DEBENTURE

The lack of available debt or equity capital has been identified as a universal concern of small businesses. Historically, commercial banks have supplied the most significant amounts of outside capital to the small business community and it is expected that this trend will continue in the future. However, it has often been said that this source of capital is not adequate for the long-term needs of smaller firms.

Additionally, there are other roadblocks for a firm seeking capital. For example, direct investments by employees or others in small independent businesses are difficult to attract as the rewards associated with these investments are rarely equal to the related risks. The small business owner is hesitant to sell an equity interest in the business because of the desire to maintain independence and the competitive advantage of confidentiality. Moreover, an equity interest in a small business is often difficult to liquidate for the intermediate-term investor.

A partial solution is a new, hybrid security for use by small businesses who need capital but in amounts less than those generally provided by venture capital companies. The new hybrid security is called a Small Business Participating Debenture (SBPD). It would combine certain debt characteristics (such as an interest rate and a maturity date) with existing equity characteristics (such as a share in the net profits of the issuing enterprise). The significant characteristics of the SBPD concept are its tax consequences. The total interest paid by the SBPD issuer would be treated as an interest expense and deductible by the company. This would include the interest due through the stated rate and any "premium" interest payments made that represent a share of net income.

The tax benefits and incentives to the investor in SBPDs include taxing "premium" interest earned as if it were a long-term capital gain and, when possible, allowing capital formation credits to flow through to the investor in a manner similar to the investment tax

credit for an investment in equipment. In the event that the investor does not recover his full investment, SBPD legislation would allow him an ordinary loss deduction.

In summary:

Advantages to Small Business Borrowers

Entire cost of borrowing is tax deductible.

Avoids giving up equity.

No necessity for additional bureaucratic controls.

Potentially, the total of borrowing could be reduced as a result of tax benefits of the investors.

Advantages to SBPD Investors

Receives tax credits as incentive for making investment.

Portion of interest (share of profits) is taxable as a capital gain.

Losses on SBPD investments would be offset by ordinary income.

The administration of the SBPDs would be relatively inexpensive as no government involvement is required nor is there any risk of loss to the government. Unlike several pieces of legislation aimed at small business, this one has only a nominal cost to the Treasury; accordingly, this solution is a practical one.

This new hybrid security has been discussed extensively and has received widespread support. In the 96th Congress and again in the 97th, Senator Lowell P. Weicker (R.Conn.) and others introduced a bill to amend the Internal Revenue Code to create SBPDs.

RESOLVED

The Small Business Legislative Council supports the concept of the Small Business Participating Debenture and urges passage of the legislation by Congress as quickly as possible.

THOR POWER

RECOMMENDATIONS TO OVERRULE THE SUPREME COURT'S *THOR POWER TOOL* DECISION AND THE IRS REVENUE RULING ON INVENTORY WRITEDOWNS

In 1979, the Supreme Court held in *Thor Power Tool Co. v. Commissioner of Internal Revenue*, 439 U.S. 522, that a taxpayer must value inventory for tax purposes at cost unless market (replacement cost) is lower. As a result of the Supreme Court's decision, the taxpayer can value inventory below market or replacement cost in only two instances: 1) where the taxpayer in the normal course of business has actually offered merchandise for sale at prices lower than replacement cost, and 2) where the merchandise itself is defective.

In March, 1980 the Internal Revenue Service issued Revenue Ruling 80-60 which requires that, pursuant to the Supreme Court's *Thor Power Tool* decision, taxpayers using a method of inventory valuation for "excess" inventory that is not in accordance with IRS regulations must change their method of inventory valuation retroactive to taxable year 1979.

The Supreme Court's requirement that a taxpayer value his inventory at less than cost, only if, in the normal course of business, he actually offers merchandise for sale at prices lower than replacement cost, is unrealistic and threatens to bring about the destruction of automobile replacement parts, parts for machinery used in factories, stores, and homes. In addition, publishing houses plan to destroy or "remainder" millions of books in the next few months because they can no longer depreciate inventories for tax purposes. Publishers expect to print fewer books in the future to avoid the chance of overstocking and to permit titles to go out of print sooner. Fewer contracts for "noncommercial" books are also likely. Other industries will have useful equipment forced into early obsolescence because replacement parts will be unavailable.

Moreover, the IRS Revenue Ruling which makes the decision retroactive to 1979 will be unduly burdensome to small businessmen who will be required to reassess their method of inventory write-downs for

taxable year 1979, the books for which have already been closed. In an era when small businesses have become an "endangered species," it is untenable for the Internal Revenue Service to add an additional burden to those already facing this segment of industry. In fact, the White House Conference on Small Business found that many of the problems faced by small businesses are caused by the federal government.

The added cost of employing the businessman's accountant full-time or of seeking advice from a large, independent accounting firm to reassess its method of inventory accounting will further enhance the problems many small businessmen have in remaining viable entities in these inflationary times. The additional time and money spent in determining a permissible accounting method for 1979 could be better spent in making the determination prospectively, thus avoiding duplication of effort and the tying up of essential personnel. Thus, the IRS Revenue Ruling 80-60 should be applied only prospectively, beginning with taxable year 1980.

The Senate Finance Committee must implement plans to make a complete study of the implications for future years on suppliers who must maintain spare parts to service their customers, and to businesses and consumers who must rely on these replacements. The Committee has recognized that the *Thor Power Tool* decision could cost the economy millions of dollars in coming years by shortening the lives of thousands of everyday items in more than 30 commodity lines, including automobiles, scholarly books, industrial machinery and equipment, and household appliances.

Legislation must be enacted to facilitate prospective application of the *Thor* decision, and, more importantly, to define a valid inventory write-down formula that accurately reflects existing conditions in industries producing these commodities.

RESOLVED

The Small Business Legislative Council urges and supports enactment of legislation to prevent implementation of the IRS Revenue Ruling 80-60 which would apply the *Thor Power Tool* decision retroactively to taxable year 1979. Moreover, the Small Business Legislative Council urges that legislation be

promulgated to substantively overrule the Supreme Court's decision in *Thor*, and to define a valid inventory write-down formula to avoid the destruction of usable property. Such legislative action will eliminate the unfairness of applying the *Thor* decision retroactively to 1979 and will save useful equipment, replacement parts and books from forced obsolescence.

VOLUNTARY WAGE-PRICE GUIDELINES

Small business is one of the sectors of our economy hardest hit by inflation. Government-mandated cost increases are the most burdensome and proportionately more costly to small business since small businesses rarely have easy access to the administrative capacity or technical expertise to comply with complex regulations. The resultant increases in cost must, in many cases, be absorbed by the profits of small businesses, primarily because they are least able to increase prices and hope to remain competitive. Increases in minimum wages, also mandated by federal and state law, as well as increased Social Security taxes and unemployment taxes, impose a burden on small businesses which must be absorbed or passed on to paying customers. Their competitive stance is thus further weakened.

No program of wage and price controls, either voluntary or mandatory, can succeed if the entire business and labor communities do not participate and cooperate (including small business). Despite small business' natural desire to be exempted, it is a fact that the control program of 1972 failed because the Pay Board exempted 70% of the small business community. The resulting increases in wages and prices put the squeeze on larger business that used small firms as sources for supplies, as well as resulting in increased prices to many small businesses' customers. Since small businesses in this country account for some 15% of the GNP and have created 95% of the new

private-sector jobs in the past decade, their inclusion and full participation is essential. The competitive edge of the small business community keeps all prices relatively low.

It is essential that the government avoid mandatory controls—the least desirable method of dealing with economic problems.

It is commendable that the Administration has recognized that one of the most elemental sources of inflationary pressures is government policy. Through the creation of a regulatory council within OMB, proposed regulations will be monitored and analyzed for their potential cost-increasing (or cost decreasing) impact. Also, the President's proposed crackdown on federal spending may begin to ease the deficits that have plagued previous administrations and added fuel to further heat up inflation.

Another commendable new focus is the government's attention to ways to increase productivity. Wage increases greater than productivity increases cause unit costs to rise, with the increases being passed on to consumers. As a way of retarding this adverse cycle, fundamental economic principles call for awarding wage increases only with accompanying increases in productivity. The resulting rise in consumer and production cost is offset by a greater labor yield and a greater supply of goods and services.

RESOLVED

1. The Small Business Legislative Council is willing to support voluntary wage and price guidelines. Such a program can only succeed if the entire business and labor communities participate, including small business.
2. Fiscal and monetary restraints, elimination of the federal deficit, and a move to slow the proliferation of government rules and regulations must be undertaken by the federal government.
3. A critical focus of the government should be on methods of increasing productivity.
4. Some provision must be made for preventing reopening of labor contracts before the full contract period has terminated, coupled with a no-strike clause during the contract period and for six months after the expiration of contracts.
5. Any new labor-management contract should anticipate the price increase due to distribution, and include that percent in the original settlement.

—continued—

6. Cost-of-living escalations built into union contracts should be limited to a one-time pass-through, and a "cap" must be placed on future cost-of-living increases.

7. Cost increases beyond the control of smaller firms, i.e. raw materials, transportation, etc., should not be charged against any standards set by any governmental body. These types of cost increases may affect the price of a product, but do not increase the profit margin of the individual firm.

8. Existing laws that protect small business, such as the Robinson-Patman Act, should be excluded from any new Executive Order or legislation if it resulted in discriminatory competitive practices.

9. A cost-impact analysis at the Office of Management and Budget, relating to inflation, should become part of both the legislative and regulatory processes.

10. All governmental programs should be reviewed and evaluated frequently in order to eliminate those programs that no longer benefit the economy and public welfare.

11. Government contracts should be awarded to firms providing products of specified quality, at the lowest cost, without regard to special minimum wage determinations.

12. *Competition brings prices down.* There must be adoption of policies by the President himself, by his economic advisers, and by Congress that strengthen the small business community so as to permit it to become more competitive. Small business is the only sector that can effectively challenge the anti-competitive practices of giant unions and giant business.

MINIMUM WAGE

The 95th Congress provided for the largest minimum wage increase in the 40 year history of the Fair Labor Standards Act, raising the minimum wage to \$2.65 in January 1978 and in three steps to \$3.35 by January 1, 1981.

The bill also provided for:

- Reduction in the tip credit from 50% to 40%, by 1980;
- Reduced overtime exemptions for numerous categories of workers, while removing in two steps the partial exemption for hotel, motel and restaurant employees;
- A new "anti-retaliation" amendment giving a private right of action to employees who suffer discharge or discrimination because they filed a complaint under the Act or co-operated in an investigation.
- Expansion of the small business exemption in three steps to \$362,500 by 1981.

Proponents of the bill also advocated inclusion of a wage indexing provision. They believed that low-wage workers would benefit by a system of annual increments in their wages, instead of being dependent on congressional action; that a series of smaller increases in the minimum wage would provide greater stability to the wage-setting process; and that employers would benefit by being able to anticipate

changes in the minimum on a regular basis. This, though, failed to pass.

Indexing the minimum wage would have a substantial impact on small business, particularly if the "index" used is average hourly wage in manufacturing.

The largest group of employees affected by minimum wage legislation is in the non-manufacturing labor-intensive area that includes many smaller retail and service concerns, as well as agriculture.

Because the manufacturing sector is highly unionized, wages in manufacturing tend to be higher overall than in other industries. While the average hourly manufacturing wage may indeed represent a "general national wage trend," the fact remains that a general national trend in manufacturing may be several years or several steps ahead of wage trends in the non-manufacturing segment, where the bulk of workers (and the bulk of smaller employers) is concentrated. By tying the minimum wage to the average manufacturing wage, smaller employers are being bound by standards that may not be appropriate or practical for their area or industry.

While the indexing provision was defeated in the 95th Congress, Congress did provide for a Minimum Wage Study Commission to conduct a study of the Fair Labor Standards Act of 1938 and the social, political, and economic ramifications of the minimum wage, overtime, and other requirements of that Act.

RESOLVED

In view of the uncertainty of minimum wage benefits to low-wage workers, and the undesirable economic effects of indexing the minimum wage, the Small Business Legislative Council opposes automatic increases in the minimum wage based on the average hourly manufacturing wage. Minimum wage is an economic policy tool that deserves close attention by the Congress and the President to determine its effectiveness. By indexing the minimum wage in regard to the average hourly manufacturing wage, this determination is eliminated. Basing minimum wages, throughout American business, on the average hourly wage in manufacturing will have a disproportionate impact on the small business sector of the economy.

SOCIAL SECURITY

In 1977, Congress completed action on legislation to better insure the long-term financial integrity of the Social Security System. High unemployment and inflation have continued to threaten the stability of this retirement benefit system, resulting in continued concern about the future fiscal soundness of the program and the need to reform the method of financing.

As passed by the 95th Congress, the Social Security bill:

- Raised the wage base for employers and employees from the 1978 level of \$17,700 to \$22,900 by 1979 and in steps to \$31,800 in 1982. Automatic inflation adjustments will occur annually after that time to a projected 1987 base level of \$42,600.
- Increased payroll tax rates for employers and employees from the 1978 level of 6.05% in steps to 7.65% by 1990. These increases will primarily affect upper income wage earners. In return for paying more into the fund those with higher incomes will be building up bigger future retirement benefits and will have greater protection while employed.
- Raised the Social Security contribution for employers of tipped workers who are now required to make payments based on the full level of the minimum wage.
- Allowed beneficiaries to earn \$4,000 in 1978, increasing in steps to \$6,000 in 1982. Over this

amount a beneficiary would continue to lose 50 cents of benefits for every dollar earned—those over 72 years of age would be exempted.

- Adopted a decoupling provision. Decoupling would correct a technical flaw caused by distortion of the automatic cost-of-living increase in the link between wages and pensions in the benefits table.
- Authorized a study of the differences in treatment of men and women under the Social Security program.

Despite this costly initiative, the Social Security System exists in a condition that is untenable over many years—its obligations far exceed its potential resources.

The major fiscal thrust of the 1977 law falls upon employers. While large companies may be able to cut back on private pension arrangements, many small businesses have no such plans and thus must absorb the full effect of an increased tax on all pay over the Social Security tax base. This discourages the adoption of private pension plans by smaller employers and encourages their termination. The burden will not be borne equally, however, and for some businesses the added payroll tax will force the organization into a deficit position. In other cases, foreign competitors will be given a cost advantage. In total, the result will be added costs, increased prices and more inflation.

RESOLVED

The proposals to put the Social Security System on a sound financial basis are, for the most part, desirable. However, general revenues should not be tapped just because it is easy to do so. Employers should not be taxed on pay that the employee is not taxed on because that is a convenient way to get money. The program should continue to be financed 50-50 by employee and employer alike.

FEDERALIZATION OF WORKERS' COMPENSATION STANDARDS

State workers' compensation programs provide a system of compensation to workers injured on the job. The system was instituted on a state-by-state basis to provide legal remedies for disabled workers whose only other recourse was to bring a law suit against the employer and prove in court that the injuries were caused by employer negligence. This process was slow, costly, and uncertain.

In the 60 years since their enactment, workers' compensation programs have assured prompt aid to workers injured on the job, regardless of who was at fault. As the program currently is structured, employers are required to assume the costs of occupational disabilities based on standards established by each of the states. There are workers' comp laws in all 50 states, each law setting a level of benefits appropriate to local needs and conditions. In some states benefit amounts have not kept pace with the rate of inflation, a fact adding further impetus to a federal standards drive. Whether workers' compensation benefits are sufficient and whether they are applied to those most in need has been a subject of numerous pieces of legislation in prior Congresses proposing a system of federalized standards for workers' compensation benefits.

Legislation proposed in the 96th Congress would have established a system of national standards for workers' compensation benefits. Under this approach, the current workers' comp system based on the individual states' rights to establish standards appropriate for their area would be replaced by standards set by Congress and adjudged by the Department of Labor. The bill also would have authorized the Secretary of Labor to issue "advisory standards" for compensation of occupational long-term diseases. Although this provision improved on earlier versions of this legislation calling for a mandatory disease compensation standards, the process through which the "advisory standards" were to be issued included a provision allowing the Secretary to recommend to the Congress that they be made mandatory. Along with establishing federal standards for benefits and compensation of occupational diseases, the

bill would have authorized the Secretary of Labor to study the feasibility of indexing total disability or death benefits to periodic changes in average weekly wages in the various states, and to submit recommendations to Congress within three years of enactment for legislation to mandate indexing of benefits.

Although the proposed legislation made other technical changes in workers' compensation standards, the combined effect of the main provisions outlined herein would place a substantial burden upon small business. The federalization of workers' comp standards, aside from various legal arguments regarding states rights in this area, would establish artificially high benefit standards for most states regardless of current wage rates and compensation levels. The resulting increase in cost once again would place small firms in the financially precarious position of either absorbing these cost increases or passing them on in the form of higher prices, thus eroding further their competitive stance.

Regarding occupational disease standards, small businesses already burdened through high insurance rates could very well be confronted with further increases if the Secretary of Labor should determine that compensation levels for certain diseases are too low and thus recommend to Congress that higher, mandatory standards be enacted. Again, the burden on small business is evident—sharp increases in premium costs, or total unavailability of insurance coverage.

Finally, allowing the Secretary to undertake the study of indexing the benefit levels to periodic changes in states' average weekly wages would add a potential for further inflationary pressures. Like increases in Social Security taxes and minimum wages, increases in workers' comp benefits lead inevitably to increasing employer costs and thus higher prices. Indexing the benefits to average weekly wages, themselves indexed to changes in the Consumer Price Index, is yet another push in the inflationary spiral. Small business would again bear the greatest share of this burden.

RESOLVED

The Small Business Legislative Council supports the current state-by-state system of workers' compensation. The state-by-state system has functioned in an effective manner for more than 60 years. Federalization of workers' compensation standards would not

necessarily guarantee that benefits will be adequate or that the system is free from abuse. Federalization would only increase costs to employers in the form of increased insurance rates, and thus would fuel inflation.

LONG-RANGE ANTITRUST ENFORCEMENT PLANNING

Despite elaborate measures undertaken by Congress during the past century to ensure the viability of small competitors, it is today easy to document a "tilt" in antitrust enforcement practices which has adverse impact specifically on the sector of the economy the antitrust laws are designed to protect, the small businesses of this country. At present, enforcement is on an *ad hoc* basis only. There are not clear guidelines to enforcement authorities to make their efforts effective in critical areas. As pointed out by a former director of the Bureau of Economics of the FTC, "The net result . . . is that the little guys, not the giants who dominate our manufacturing and trade industries, typically get sued."

Strict enforcement of antitrust laws would result in an enhanced social benefit, as competition would be strengthened from a larger number of healthy competitors. What is needed is a rational set of policy guidelines to direct antitrust enforcement authorities to the areas where their efforts would achieve optimum remedies. Formulation of such a long-range plan by the Congress is a task of surpassing importance in the economy of the coming years, which today is suffering from the difficulty of ensuring a competitive sector in the business community. Efforts to step-up enforcement of antitrust laws must have as its goal the encouragement of the small-scale enterprise as the only realistic check against giantism in business.

RESOLVED

The Congress of the United States must affirm that the antitrust laws exist to preserve the very nature of the competitive economy on which our country is founded, and in doing so, must act to strengthen that sector of the economy which fosters competition, small business. Congress must act to stem the spread of concentration, and in doing so, ensure diversity, choice, and opportunity for future generations of citizens. The specifics of long-range enforcement planning should include the following elements:

1. Preservation of a plurality of antitrust enforcement authority, as embodied in the FTC and Department of Justice.
2. Prior to the institution of government antitrust proceedings, a competitive impact statement must be filed in the court, setting out the reasons why the government believes it essential that the matter be litigated; the reason why the defendant or defendants were selected; and the objective of the litigation—what the government seeks to achieve.
3. That the rigors of *per se* rules of antitrust

culpability be determined inapposite and inappropriate in reference to smaller-scale enterprise.

4. That antitrust enforcement be tailored to restore competition in a target industry in the direction of a realistic norm, keeping in mind that the best vehicle for restoration of competition is a healthy and thriving small business component. Current policy allows selection of a relatively small component in a given industry, usually a small to medium-size business, and then harsh punishment with antitrust sanctions for the purpose of "setting an example."

5. That the impact of the challenged market behavior be based on actual empirical evidence rather than the application of theoretical rules. Under the present system, the application of arbitrary rules tends to suppress healthy and desirable competitive practices employed for the purpose of gaining a foothold in a market, or meeting the deep pocket competition of a giant-scale conglomerate enterprise. What is proposed is attuning enforcement to the realities of the marketplace, rather than in a manner consistent with *a priori* notions.

THE ROBINSON-PATMAN ACT

Antitrust law has a single stated goal: preservation of competition. That goal motivated the U.S. Congress to enact the Sherman Antitrust Act in 1900. The Sherman Act, though, could provide penalties only in those instances in which offenses had already taken place. The 63rd Congress strengthened existing antitrust law with passage of the Clayton Act. The basic intent of the Clayton Act was to prevent monopolies from being formed through the use of unfair, anti-competitive trade practices.

The Clayton Act, however, proved to be ineffective against price discrimination, partially by reason of inadequate enforcement and partially due to judicial interpretation. Under the interpretation of the Clayton Act, there was no mechanism to prevent the stifling of competition through the granting of excessively favorable pricing for items purchased by large buyers.

To remedy this, the Congress in 1936 overwhelmingly approved the Robinson-Patman Act, which has come

to be known as the "Magna Carta" of small business. The Robinson-Patman Act forbids price discrimination between purchasers of goods of like quality in interstate commerce, where the effect of such discrimination "may be to substantially lessen competition or tend to create a monopoly in any line of commerce . . ."

A jurisdictional requirement of the Robinson-Patman Act allows action under the Act only where the price discrimination *may lessen competition or tend to create a monopoly*. This essential clause clearly points out that the Act, as originally framed was created to promote competition, and to discourage increased concentration.

The Robinson-Patman Act does not "reward inefficiency," as its critics claim, but does prevent rewarding the largest buyers in the market simply because of their size. Large buyers may claim a purchasing advantage, but this must be based on the cost-justified volume of their purchases.

RESOLVED

To assist the small business, the Robinson-Patman Act was enacted to stop in the incipency anticompetitive practices which have plagued this country. The Robinson-Patman Act is a cornerstone which small business stands behind, and any effort to erode its principles is opposed, since this would lead to a weakening of the segment of our society which has built this country. The "administrative repeal" of the Robinson-Patman Act must be reversed, and funds specifically for Robinson-Patman Act enforcement need to be appropriated. The FTC must be required to show the effects of its enforcement of "The Magna Carta of small business."

COOPERATIVE ENDEAVORS

Nowhere is the "tilt" in antitrust enforcement more evident than in respect to cooperative activity between and among small competitors. One firm with a market share of 30 to 60 percent can establish prices for its products, allocate production, share inventory and reap the advantages of large-scale research and development. Yet if two independent firms, each having 5 percent or less of the market, attempt by agreement to accomplish the same purposes, the antitrust agencies do not hesitate to bring legal proceedings on the basis of *per se* violation theory.

Congress has provided that the Attorney General may permit the formation of small business groups so as to enable them to compete with dominant firms more effectively, and without the threat of antitrust liability. The Small Business Act of 1958, as amended in 1967, ostensibly permits the cooperation of small business firms for the purposes of obtaining raw materials, inventory, supplies, research and development, and equipment, so as to permit more effective competition with a large-scale firm by a smaller-scale business.

RESOLVED

It is recommended that Congress should expand opportunities for small firms to participate in cooperative endeavors to enable them to compete with giant companies, thereby countering the accelerating trend toward concentration.

MERGER POLICY

The antitrust enforcement agencies see no way to halt the merger trend among giant companies except by new legislation. In their opinion neither the Clayton Act nor the Celler-Kefauver Act are effective.

In the period 1951-1977 large industrial mergers totalled 2332, with only 8.1 percent of these being challenged. The Justice Department says, "Under the present law, we have no basis even to open a preliminary investigation."

Although small business is deeply concerned about economic concentration and monopoly power, there is reasonable cause for alarm that in stopping mergers between large companies, small companies (those with less than 20 percent market share) will be targeted for acquisition by the larger companies. At the same time there must be recognition that many smaller companies would be most reluctant to lose any right to dispose of their business by a tax free

stock exchange with a larger company.

Failing companies also require special consideration because of the employees involved and potential damage to the community. No provision is made for this in the affirmative defenses and this is a critical omission.

Much of the antitrust problem relating to failing companies rests with the antitrust agencies themselves. Merger and acquisition policy has been applied most harshly in reference to small business concerns experiencing difficulties. Although the courts have recognized the failing company defense, the antitrust authorities have been most inhospitable thereto, *narrowing the scope of the exemption so as to make it useless to all but a wholly bankrupt business firm*. At that time, of course, the small business firm finds itself unable to sell or liquidate on anything resembling advantageous terms.

RESOLVED

1. It is clearly the intent of merger and acquisition policy to inhibit monopoly growth of the large. However, present application of antimerger policy is most punitive to smaller companies. Application of these policies with respect to the "failing company" needs re-evaluation.

2. Furthermore, in light of the increasing trend towards concentration through what is known as "conglomerate mergers" and the apparent inability of present antitrust laws to deal adequately with this type of activity, the Small Business Legislative Council endorses the concept behind legislation proposed in the 96th Congress which would have restricted mergers among corporations of certain sizes. However, prohibitions against acquisitions of companies with 20 percent or more of sales in any significant market should apply only to (a) acquired companies with larger market shares and (b) only where the acquiring company initiates the attempted merger.

EXPEDITING SMALL BUSINESS COURT ACCESS FOR ANTITRUST LITIGATION

Because of various expense impediments to small business plaintiffs, and incentives in the present system encouraging defendant delay, no effective way exists for small business to assume an active role in the enforcement of antitrust statutes, even though it may now have a nominal right to go to court.

Outlined here are proposals described as the Small Business Court Access Act, advocated by the Small Business Legislative Council, to streamline and make less expensive the ground rules employed in small business suits.

1. The removal of several impediments to collective, or class small business relief is essential if small business is to have effective, privately initiated antitrust remedies when price fixing, price discrimination, or monopoly power is found. Government enforcement of some antitrust laws of great importance to small business has been virtually at a standstill.

2. Present requirements determining when small business can join together to sue as a class now encourage a proliferation of unnecessary and unrelated factfinding. All this rewards the litigant with the superior resources.

The Small Business Court Access Act simplifies greatly the standards governing the possibility of collective action so the court can identify quickly and directly those actions appropriate for collective relief. Such reform would permit expeditious treatment of the merits of small business actions.

3. The Small Business Court Access Act mandates that there be an early evaluation of the merits of a small business class damage action under the antitrust laws and other federal statutes. Small business can use this tentative judicial evaluation to assess the wisdom of pursuing the action and committing further dollars and time to it. This requirement will also encourage the judge to take early, firm control of the litigation. Discouraged will be open-ended expensive litigation battles to determine facts only of slight importance, and other forms of procedural delays. Such strategies have been conducted by some defendants who desire to exploit their superior litigation resources.

4. In those collective actions involving a range of small and large injuries to small business, the Small Business Court Access Act would also make available

government funds to pay the expenses of private attorneys representing small businesses and others. The funds would not come from the general treasury, but from unclaimed portions of prior class action recoveries. Use of these funds to pay the costs of private attorneys representing small businesses and others would be a significant step forward. It would help to alleviate the well-known financial pressures on the small business attorney, who, in many cases, will be advancing expenses. Such pressures encourage an attrition strategy by the other side and can force settlements. These funds will also help offset government enforcement inertia in certain areas.

5. The Small Business Court Access Act would also make available up to \$10,000 to a small business which detects and advances the prosecution of an antitrust violation such as price fixing or price discrimination. This incentive would encourage detection where the actual injury to a particular small business is slight, but where the aggregate injury inflicted on the large numbers of businesses is large.

6. A basic theme prompting the class action portion of the Small Business Court Access Act is the need to break large, complex antitrust actions into manageable phases. If judicial officers were given the tools to follow an orderly litigation progression (including the ability to conduct early inquiries into the merits before extensive expenses are incurred by small business classes), small businesses alleging important, complex, innovative theories under the antitrust laws would have a much greater chance of achieving a settlement or trial determination within a reasonable period. Further it is much less likely that small business class actions would be dismissed on the grounds that they are unmanageable. Such dismissals are not entered without analysis of the underlying merits of the small business claims.

7. When involved in antitrust class damage actions small businesses are on the plaintiff side 80 percent of the time. Small businesses who bring legitimate actions may find them disfavored by courts influenced by the propensity of some attorneys to bring frivolous cases solely to secure fees. Not only are legitimate small business plaintiffs indirectly harmed, but defendants are put through unnecessary time and expense, often causing these defendants to be less reasonable in the context of a legitimate suit.

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The preliminary hearing, mandated in the Small Business Court Access Act, addresses this problem by allowing the court to put aside extensive procedural inquiry and first see if the lawsuit has any basis. Not only would this eliminate nuisance suits that may indirectly harm small business, but it would give small business an early look at the possible judicial success of its suit, an insight which would be invaluable in determining the resources to be expended.

8. Some defendants, when confronted by serious small business class actions, will attempt to use their superior litigation resources to employ motion practice and factfinding procedures to delay, or to reduce the size of the class. As a stratagem to reduce the class, the defendant may propound questions to all small business class members. Or lengthy interviews may be conducted with them. Members of the small business class can be barred from recovery if they do not respond or participate in these maneuvers. Often very little of the material developed is ever used in the litigation. Such strategies also force counsel for the small business class to expend much unproductive time.

The Small Business Court Access Act would limit early factfinding on the threshold issues determining whether collective small business relief is appropriate. In addition, there is a prohibition on factfinding aimed against class members, unless court permission is obtained after a showing that the information is necessary for the advancement of the action and cannot be obtained without undue hardship by other means. Failure of the small business to respond to such discovery when ordered will not bar it from recovery in a successful action.

9. The Small Business Court Access Act would also regulate the fees an attorney could charge to the recovery of small businesses and other class members.

10. Presently, when one or several small businesses bring an action for redress under antitrust or other statutes, they will receive, if victorious, compensa-

tion only for the injury inflicted upon them at the time the law was violated. Typically they will not receive any interest on the value of this injury to compensate for the time required to secure redress.

The Small Business Court Access Act would ensure that small businesses are compensated not only for their injury, but for the period they must bear the burden of this injury. This is needed not only to compensate more fully small businesses, but also to remove an incentive for defendant delay. If defendants are not required to pay interest, then they have every incentive to delay settlement or trial in order to use the funds likely to be paid as a judgment at the prevailing small business interest rate during the pendency of the action.

11. Often a government antitrust judgment will suggest that small businesses also have a right to redress for the injury inflicted by the violation. However, the government normally will not seek as part of its judgment compensation for such injury. It will rely on the initiative of private attorneys, who will use the government judgment to secure compensation for the businesses. However, the federal antitrust law determining the weight given in the subsequent proceeding to the prior government judgment has been construed by the courts in a restrictive manner. Some courts find that the defendant is entitled to assert all his defenses notwithstanding the rejection of such defenses in the prior government action. Small business is required to relitigate at great expense all these issues.

The Small Business Court Access Act would accord the government proceeding full force in these subsequent suits. To the extent particular issues were litigated, or could have been litigated, the result would be binding upon the defendant. This position is supported by the Antitrust Division and the National Commission for the Review of the Antitrust Laws and Procedures. Its implementation would materially assist in expediting individual and class antitrust litigation on behalf of small business and reduce its cost by limiting the need for wasteful relitigation.

RESOLVED

The present judicial system has operated to the detriment of small business. Small business cannot afford to pay to secure its rights. Procedural reform is essential. Comprehensive solutions are urgently needed if there is to be a vigorous private enforcement of antitrust laws. When small business' entitlement to a

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free and competitive market has been drained, it can rely on government action only to a small degree. Small business has always relied on private initiative. The Small Business Court Access Act would allow small business to do so in this area and to pursue its remedy under law, rather than suffer its antitrust wrongs in silence.

As steps to enable small business to secure quick, inexpensive, and efficient redress from antitrust violations, the Small Business Legislative Council supports, in principle, (a) a revision of court procedures to allow small businesses to join together in collective actions to secure redress for injury suffered by the same illegal conduct, and in particular supports legislation to make this redress less complex, less costly and more efficient, and financial assistance to pursue such remedies; (b) legislation designed to allow greater small business reliance, as a matter of proof, on prior government judgments when small business brings subsequent suits based on the same conduct found to be illegal; and (c) legislation designed to reduce the financial incentive which larger business has under the existing Tax Code to delay the day of damage judgment when sued by small business since such costs incurred in pursuing a strategy of delay are deductible.

Small Business Legislative Council similarly supports allowing small businesses to join together in collective action in the matter of court review of rule-making by the Federal Trade Commission and specifically urges that the complete record of rule-making hearings, in such form as acceptable to a court, be made available at government expense to the plaintiffs in such collective actions.

RECOMMENDATIONS OF NATIONAL COMMISSION FOR THE REVIEW OF ANTITRUST LAWS AND PROCEDURES

BACKGROUND

The 1979 Report of the National Commission for the Review of Antitrust Laws and Procedures (NCRALP) was not a broad review of antitrust policy or antitrust law. Rather, the Commission was directed by Executive Order 12022 to study and make recommendations on (1) the resolution of complex and protracted antitrust cases, and (2) the desirability of retaining the various exemptions and immunities from the antitrust laws.

The Commission was a well-rounded one whose members represented diverse antitrust philosophies. The Commission's recommendations included no radical suggestions for resolving the problems of unreasonably protracted litigation in complex antitrust cases. Nevertheless, the results of the NCRALP deliberations were enforcement oriented. The Commission's specific recommendations and the general principles it espoused with regard to the "big case" were clearly consistent with a view that antitrust laws should be vigorously enforced in a way that would produce results. In the area of immunities, they constituted a serious and well-thought-out criticism of existing economic regulations.

THE "BIG CASE" PROBLEM

The Commission Report recommended ways to speed up complex antitrust litigation and urged Congress to consider several changes in the antitrust laws to implement these recommendations. A consistent theme was the Commission's call for more aggressive and orderly involvement by judges and lawyers handling complex cases. The Commission recognized the appropriateness of leaving intact broadly drawn, substantive rules of antitrust law so that fundamental and general principles could be applied to changing economic and industrial conditions. The Commission did not find that the substantive laws cause litigation delay. Rather, the Commission stated that "the failure of some judges to manage and control complex antitrust litigation adequately is a major component of unreasonable delay" and that "an uninvolved, unaggressive judicial posture is a prescription for directionless litigation and excessive delay." Therefore, at the outset of its Report, the Commission recommended early and active judicial involvement and control in all antitrust litigation.

The Commission also recognized that there are strong financial incentives operating on private par-

ties, both plaintiffs and defendants, which contribute to delay. Related lawyer excesses and inefficiencies must also be curbed.

The Commission recommended specific changes in the rules relating to time limit and sanctions.

The Commission's recommendations for resolving complex antitrust litigation were not limited to changes basically procedural in nature, however. The Commission focused on relief and substantive standards in monopolization cases. Since such cases are obviously the primary source of delay in antitrust litigation, the Commission analyzed means of improving antitrust remedies in Chapter Seven and in Chapter Eight the feasibility of revising the substantive law. The Commission made certain recommendations for major substantive changes in Sherman Act section 2 which are particularly noteworthy.

The Commission flatly recommended that "whenever a violation of the antitrust laws involving market power has been shown, courts should order relief that will *effectively eliminate that power*." The Commission chastised the government, potentially the best source of expertise with respect to structural relief, for failing to devote adequate attention and resources to the question of remedies. Finding that "the existence of unlawful monopoly power is at the heart of a Sherman Act section 2 violation," the Commission recommended that structural relief should be the preferred remedy whenever a violation of Sherman Act section 2 or Clayton Act section 7 has been found. The Commission's conclusion:

"In essence, the effectiveness of structural relief in ending the illegal conduct, preventing its recurrence, curing the ill effects of the conduct, and depriving defendants of the benefits of their illegal conduct is more certain and brings the matter to a conclusion more quickly. Structural relief requires an immediate adjustment, but once it has been accomplished, the defendant firm regains control of its operations. With respect to third parties, structural relief is often preferable because its effects are clearer and more certain. For these reasons, the Commission concludes that structural relief should be the preferred remedy whenever a vio-

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lation of Sherman Act section 2 or Clayton Act section 7 has been found."

The Commission also recommended that laws inconsistent with antitrust objectives be reevaluated and, if necessary, changed.

Chapter Eight, in Section II of the Report, comes as close to endorsing a so-called "no fault monopolization" statute as can reasonably be expected. First, it recognized that the "dangerous probability of success" standard necessary to establish an attempt to monopolize has led to an "overly restrictive" view of the attempt to enforce provisions of section 2. The Commission favored an approach to this provision which looks to the defendant's capacity and intent and the anticompetitive character of the defendant's behavior. The court would then determine that a dangerous probability of monopoly exists when the defendant's conduct substantially threatens the maintenance of competition.

In the second part of Chapter Eight, the Commission endorsed the concept of a conduct-free liability standard for section 2 cases. In addressing the problem of "persistent monopoly power," the Commission first recognized that persistent monopoly power is contrary to "a fundamental tenet" of antitrust laws that "markets ought not to be under the control of a single individual or enterprise, but rather should receive the benefit of competition among several firms." Therefore, the Commission concluded:

"On the basis of the arguments presented, and on the basis of the judgment and experience of its members, the Commission believes that persistent monopoly power, in all but the most exceptional instance, can only result from culpable conduct. Thus, the Commission concludes that, as a practical matter, liability can safely be presumed without an affirmative showing of culpable conduct. Hence, even if the government is not required to offer affirmative proof of conduct, it is highly unlikely that the adoption of a no-conduct standard would impose liability on an innocent monopolist."

The Commission could not agree on a proposal that would implement this liability policy. However, it recognized that proof of past bad conduct "is simply not central" to a proceeding under section 2 if the goal of the Sherman Act is the dissipation of persistent monopoly power. The Commission urged Congress to undertake hearings to explore the impact of business and consumers of adopting a no-conduct proposal.

ANTITRUST IMMUNITIES

Part Two of the Commission's Report dealt with antitrust immunities and economic regulation. The Commission's Report provided a comprehensive framework in which to review individual antitrust immunities.

The Commission clearly opted in favor of a free market approach to presently regulated areas of the economy. In all of the areas analyzed the Commission would, in effect, put the burden on those advocating regulation to justify its continued existence.

The Commission therefore adopted the following analytical approach to the question of antitrust immunities. First, what was the original purpose of Congress in enacting the immunity in question? Second, have the regulatory goals originally conceived by Congress been achieved; or have changed conditions or new learning undermined the assumption on which the regulatory structure was first justified? Third, what costs or benefits have been associated with the immunity and its attendant regulatory scheme? Finally, if removal of the antitrust immunity and deregulation appear justified based on changed economic conditions or unacceptably high social costs, what questions relating to methods of transition should be considered? The Commission recognized that this framework suggests that an industry-by-industry examination of each exemption and regulatory scheme is preferable and it structured its report in that manner.

THE SBLC'S INTEREST IN THE COMMISSION REPORT

It appears obvious that the small business community should be encouraged by the NCRALP Report. If as a conceptual matter vigorous antitrust enforcement is deemed to benefit small businesses, and if sincere and significant measures are taken which will result in those laws being applied seriously and in an effort to do more than create a good public relations image, then the small business community will want to rally behind the Commission's recommendations.

The Commission's procedural reforms would make it easier to bring antitrust actions against large targets. The Commission's recommendations regarding time limits for complex civil actions would have forced both lawyers and judges to maintain an orderly proceeding.

Of particular note is the Commission's recommendation in Chapter Three that Rule 26(b) be amended to narrow the scope of discovery and that Rule 26(c) be

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amended to make it clear that the court may, on its own initiative, protect against annoyance, embarrassment, oppression, or undue burden or expense related to discovery. No one can justify *unreasonably* protracted litigation. Amending existing discovery rules to limit unreasonable delays, and, in particular, to limit the ability of a party to flood its opponent with non-information and overly broad discovery requests will likely result in greater access to the courts. This, of course, will better enable small businesses to protect themselves.

Also in Chapter Three the Commission recommended that the government be allowed to share in materials discovered in private litigation. The Small Business Legislative Council supports suggestions such as this one which make it easier for the government to carry out its role as an antitrust enforcer on behalf of the public.

The Commission's recommendation in Chapter Four that parties exchange contentions and information concerning relevant market shares early in proceedings will conceivably eliminate unnecessary, complex factual questions and lead to quicker judicial resolution of a dispute.

The Commission's Report stressed the need to restore marketplaces dominated by persistent monopoly power to effective competition. More importantly, the Commission's discussion emphasized the need to create workable competition through the establishment of new entities, if necessary.

There should be more competitors in the marketplace, rather than less, as one means to restore effective competition particularly in its discussion of no conduct proposals. On page 156, the Commission Report stated:

"The presence of persistent monopoly is contrary to a fundamental tenet of the antitrust laws, that markets ought not to be under the

control of a single individual or enterprise, but rather should receive the benefit of competition among several firms."

The Commission's Report nowhere recognized the unique needs of the small business community; nor does it adopt expressly a conduct-free liability standard under section 2. However, it seems clear that at least a majority of the Commission favored a conduct-free standard, and that the Commission as a whole officially approved of the concept. Moreover, the thrust of the Commission's recommendations and the principles underlying its discussion of section 2 problems were completely consistent with the Small Business Legislative Council's position that the government must take decisive action to introduce more competition into today's concentrated economy.

Finally, if it is easier for the government to bring the "big case" because of changes in the substantive standards which are to apply, then it is easier for the government to abandon its "two-tier" enforcement philosophy. Such a result is of course strongly supported by the small business community.

CONCLUSION

The Commission's Report was candid, but not inclined to recommend radically new legislation. It can serve as a springboard for advancing changes in the law which will benefit the constituency of the Small Business Legislative Council membership. The Commission's discussion of section 2 was especially illustrative. While the report offered no clear answers, it created a favorable opportunity for the small business community to make its views known on the question of how section 2 could be amended to restore effective competition in the marketplace. The Commission made recommendations and embraced principles which are important to the small business community and which are consistent with its aims.

RESOLVED

In support of the thrust of the Commission Report, the Small Business Legislative Council adopts these positions:

The Small Business Legislative Council endorses and supports the recommendations contained in Chapter

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Three of the Report of the National Commission on Antitrust Laws and Procedures to the effect that more effective controls be imposed on a court-supervised basis on pretrial discovery and other proceedings in complex antitrust litigation.

The Small Business Legislative Council endorses and supports the recommendations contained in *Chapter Four* of the Report of the National Commission on Antitrust Laws and Procedures to the effect that earlier definition of the issues should occur as a means of limiting discovery and simplifying pretrial proceedings. These reforms call for increased use of stipulations and requests for admissions, the early exchange of the contentions of the parties, and employment of summary judgment or partial summary judgment for the purpose of narrowing, resolving, and eliminating issues, and the more liberal use of interlocutory appeals.

The Small Business Legislative Council endorses and supports the recommendations contained in *Chapter Seven* of the Report of the National Commission on Antitrust Laws and Procedures to the effect that structural relief by way of divestiture of monopoly power should be employed more frequently by the courts, both in government cases and private litigation. This would include the development of guidelines for the use of the divestiture remedy such as spin-off, sale of assets, etc., with a view toward restoring effective competition in the marketplace.

The Small Business Legislative Council endorses and supports the recommendations contained in *Chapter Eight* of the Report of the National Commission on Antitrust Laws and Procedures to the effect that the Sherman Act should be amended to broaden the present scope of the "attempt to monopolize" language of section 2 of the Sherman Act. The proposed reform would also permit the full use of economic data as an alternative to proof of predatory conduct, and would upgrade antitrust enforcement to deal with the problem of the existence of persistent monopoly power, even in the absence of proof of predatory behavior or the maintenance of market entry barriers.

The Small Business Legislative Council endorses and supports the recommendations contained in *Chapter Fifteen* of the Report of the National Commission on Antitrust Laws and Procedures to the effect that all statutory-based regulatory schemes be critically reviewed with a view toward limiting their functional scope as inhibitors of competition and limiting and curtailing the attendant antitrust immunities as to such regulatory schemes.

PROCUREMENT AND INNOVATION POLICY

For decades, Administrations of the major political parties have promised small business a "fair" or "adequate" share of federal procurement (currently running close to \$80 billion a year.) The share of contracts actually awarded to small business has ranged from 16 percent to 23 percent, and small business subcontracting requirements have not been adequately applied to all large federal contract agreements.

Expenditures for federal research and development have been even more concentrated towards large business. Less than 5 percent of the federal R&D dollar now goes to small businesses, which have historically been the most fertile spawning ground for innovations in technology. In many cases the large corporations have a vested interest in continued use of existing technologies and products, which creates a conflict of interest in their R&D work for the government.

Even in the face of growing economic concentration in other areas, studies by the Department of Commerce and the Office of Management and Budget indicated that in 1975, small firms and individual inventors continued to account for more than one-half of all inventions and innovations. On 3.4% of all federal R&D dollars, small firms have produced 24 times the new commercial ideas, inventions and innovations per dollar than large companies. Government policy should encourage this inventiveness by making funds for research and development, as well as production capital, more readily available to small business.

RESOLVED

The Small Business Legislative Council urges that the federal government set firm goals of 50 percent of prime contracts and 75 percent of sub-contracts for award to small businesses. In addition, the federal government should implement policies that reward innovation and encourage the traditional small business willingness to explore and expand in new directions by increasing small business share of federal R&D expenditures to at least 25 percent of the total.

AN EQUITABLE POLICY FOR SMALL BUSINESS PATENTS ON INVENTIONS MADE WITH FEDERAL ASSISTANCE

One of our nation's greatest problems is the decline in the rate of productivity growth, and a major factor in this decline has been the discouragement of innovation at the small business level. Less than 5 percent of all federal research and development dollars go to small business, yet both a Department of Commerce study in 1966 and an Office of Management and Budget study in 1977 show that small business accounted for more than half of all scientific and technological developments since the beginning of this century. A National Science Foundation study for the period between 1953 and 1973 found that small firms produced 4 times as many innovations for every research and development dollar as medium sized firms and 24 times as many as the largest firms.

Prior to passage of the University and Small Business Patent Procedures Reform Act, in the 96th Congress, many small innovative companies avoided the federal research grant process simply because of the uncertainty over whether or not they would be allowed to retain patent rights on inventions made under research sponsored by federal funds. Now P.L. 96-517 allows small businesses to obtain limited patent rights on discoveries they have made with federal money.

Experience had shown that unless the private sector (including universities, individual inventors, and non-profit organizations) is given sufficient incentive to bring new innovation to the marketplace, the development of new technologies will decline. Given the

rapid drop in U.S. productivity increases over the past few years, it is apparent that new technology development in the U.S. must be encouraged.

The federal government itself is a prime disincentive for innovation development—inventions made under various agency grants have been allowed to waste away in government storerooms benefiting no one. The Departments of Energy and Health, Education, and Welfare, for example, often take months and in some cases years to review petitions for patent rights on inventions developed with federal grants. And, when the government decides to retain patent rights on these inventions, there is little chance that they will ever be developed. Of the 30,000 patents that the government presently holds, less than 4 percent are ever successfully licensed. This is very little return on the billions of dollars that are spent every year on research and development.

Small businesses are now allowed to obtain limited patent protection on discoveries they have made under government-supported research if they provide the additional resources needed to successfully commercialize the product. This change should provide the American marketplace with additional innovative product developments and remove the disincentives to many small companies from participation in the federal R&D process. The benefit is not only for small business, but the American economy, as well, since small firms have been the greatest source of new jobs in the past decade.

RESOLVED

The Small Business Legislative Council supported changes in government patent policy to allow small businesses patent protection on inventions made under government-sponsored research, with allowance to permit the government to recoup its initial funding under certain circumstances. Small business innovations developed under federal contract are now patentable by the contractor, allowing that business a reasonable time to develop the new idea commercially.

In addition, the government should provide exclusive license to inventions and innovations, with preference to small business. This will provide an increased incentive to the traditionally innovative small business sector to seek R&D contracts and to commercialize new and beneficial products for the marketplace.

UNDERFUNDING OF THE U.S. PATENT AND TRADEMARK OFFICE

The United States traditionally has been a leading innovative nation, the creator of new industries in electronics, lasers, antibiotics, synthetic fibers, and instant photography, to name but a few. Most of these industries sprang from inventions by small business entrepreneurs.

Although our present patent system has contributed significantly to an environment conducive to innovation, there has been a marked decrease in the rate of innovation and in the amount of R&D investment devoted to new product lines and basic research.

While there is general consensus that the patent system has served the country well, and that no major overhaul is recommended, there are problems of a procedural nature within our patent process which have a detrimental effect on innovation—particularly in the small business community.

Under the present system, before a patent can be granted to any individual, tests of utility and novelty must be met. Before granting a patent, an Examiner in the U.S. Patent and Trademark Office (PTO) undertakes a manual search through the prior publications available in order to determine whether the same or similar invention has been disclosed.

These prior publications consist of over 4 million

U.S. patents, a like number of foreign patents, and countless literature references. Prior art is classified into 80,000 classes and subclasses with cross references. The information listed in this manner is thus a useful tool, but only if it is complete and readily accessible.

If, after tests of utility and novelty are met through scanning of prior art, a patent is issued, all others are excluded from making, selling and using the invention disclosed in the patent. However, if the prior art references are not complete or sufficient to disclose an already-existing patent, the patent issued by the Examiner is thus subject to challenge in the courts. Challenges of this kind include further searches of prior art and most of the time better art will be found. In the district court level, 50% of the patents will be declared invalid; at the appeals court level that figure climbs to 72%; and finally, at the Supreme Court level, the invalidity percentage approaches 100%. For small businesses dependent on a particular patent, a declaration of invalidity can mean bankruptcy.

Part of the cause of this problem lies within the PTO itself, and SBLC believes that if the PTO is to remain an effective patent-granting and innovation-promoting agency, then the reliability of its patent-granting process must be improved.

RESOLVED

Since 1976, the total actual appropriation for the PTO has actually declined, after adjusting for inflation. The Small Business Legislative Council urges the Executive branch to request, and Congress to appropriate, sufficient funds to insure an adequate number of examiners and systems support so as to make the PTO more effective and achieve shorter pendency of applications and greater reliability in the validity of U.S. patents issuing from the U.S. Patent and Trademark Office. These actions will increase the integrity of prior patent search files and increase the number of publications available to patent examiners, and enable the PTO to employ modern methods for storing and retrieving the information in these expanded files. The net result will be an improved innovation and productivity outlook for the U.S.

TECHNOLOGY TRANSFER

The small business community is currently plagued by severe limitations in its ability to adequately acquire and utilize existing and developing forms of technology. Small business' access to appropriate technology has been relatively catch-na-catch-can and often accidental. Small firms are often not equipped with the manpower, financial resources or even the most fundamental types of knowledge necessary to take advantage of recent or existing technological advances. In all cases, this problem is exacerbated by the chronic lack of informational and referral services to which small business people can turn to find an answer to a specific technology problem.

Because the small business community has such a defined need for assistance that will enable it to take advantage of the vast amounts of federally-funded R&D work now being done, an effective Technology Transfer program would provide for the identification of technical information, alert a small business owner to new processes, products, systems and techniques, and supply direct, personal and practical technical assistance that is largely unavailable and unobtainable today.

American's stance in the world marketplace has grown continuously weaker. Our increasing balance-

of-trade deficits with our major trading partners—i.e., the Common Market countries and Japan—our declining productivity growth rate, and our waning technological innovation and development have all contributed to this weakened economic condition. A major reason is this country's disinterest in a truly innovative and productive small business community. A technology delivery system to serve small business needs could play a significant role in reversing the U.S. economic slide.

Most industrialized nations have government-subsidized technology dissemination and research programs for their small businesses so that these firms can take the lead in technology development and application. For these countries, a major benefit of such assistance programs is heightened ability of small businesses to compete in foreign markets, and the result is a more effective method of maintaining a healthy balance of trade. The same result can be achieved for the United States should such a program be developed.

Legislation to expand the Small Business Development Center program was enacted in the 96th Congress.

RESOLVED

The Small Business Legislative Council urges continuation of effective technology transfer programs to assist small businesses in solving problems concerning development, application, and availability of emerging knowledge.

GOVERNMENT CONTRACTING OUT

It has been a long standing policy of our government, both legislative and administrative, to rely on competitive private bids for the goods and services which it requires.

There has been an increasing tendency in government to compete with private business in providing additional "in-house" participation at the expense of commercial opportunities, even at higher costs to the taxpayer. This is counter to the goals of P.L. 95-307, October 24, 1978, an Act to Amend the Small Business Act, and the Small Business Investment Act of 1958, which relates to government procurement from small businesses.

The Small Business Administration in March 1980 reported its findings in an intensive study entitled "GOVERNMENT COMPETITION - A Threat to Small Business." This report calls for preference for private enterprise to be supported by specific legislation and federal policies as necessary to achieve these aims within the framework of maximum cost-effectiveness. These findings are supported by extensive

testimony recorded by the SBA in hearings throughout the country.

There are forces in government which oppose this policy and seek rather to expand the role of government in providing the services and products at the expense of small private business. The procedural approach is by way of legislation to permit federal agencies to increase personnel ceilings whenever they feel that they can do a job better than private companies. This in effect voids existing personnel ceiling restraints on government growth contained in the Civil Service Reform Act of 1978. Cost-effectiveness in essence becomes a secondary consideration since current regulations requiring cost reviews under Executive Order A-76 are voided.

Enactment of such legislation would endanger the small business share of federal procurement which now amounts to about \$6 billion annually from civilian agencies alone. A substantial portion of this is now provided by minority businesses, which will be endangered.

RESOLVED

The Small Business Legislative Council supports greater opportunities for private enterprise, particularly small business, to provide a higher share of goods and services used by the government. The objective of contracting on the most cost-effective basis must be observed. This is consistent with our previously stated goals of 50 percent of prime contracts and 75 percent of subcontracts for award to small business. The Small Business Legislative Council opposes any legislation or administrative effort which would reverse this position.

REVISION OF NATIONAL LABOR RELATIONS ACT

The month-long filibuster which sent the Labor Reform bill back to the Human Resources Committee in July, 1978, eventually resulted in its failure to be reconsidered during the 95th Congress. The measure was introduced to help bolster slipping union memberships which has resulted in less money for the powerful Washington-based unions.

The filibuster withstood a record six cloture votes. Though the 41 Senators who opposed the measure were in the minority in the Senate, they had substantial support from people across the country. One public opinion poll after another clearly showed that the citizens of the nation were not supportive of a program that would give additional power to the unions.

No action was taken in the 96th Congress.

RESOLVED

The Small Business Legislative Council supports revision of the National Labor Relations Act if such amendments are balanced, constructive, and equitable to all interests—the public, the employer, and employee. The Small Business Legislative Council opposes any amendments to the National Labor Relations Act which would be detrimental to the public, the employer and the rights of the individual employee.

COMMON SITUS PICKETING - SECONDARY BOYCOTTS

Under current law, both the U.S. Congress and the U.S. Supreme Court have determined that the practice of common situs picketing, or allowing the employees of one company on a construction site to close down the entire site because of a dispute with their employer, constitutes a secondary boycott. And "secondary boycotts" have been ruled unfair labor practices, and thus illegal.

Despite the fact that membership in the building trade unions has grown steadily in the years that common situs has been prohibited, the AFL-CIO has placed passage of the common situs bill high on its list of priorities.

There are many arguments against the legalization of common situs picketing and secondary boycotts. Among them:

1. Common situs would increase dramatically the power of the construction unions in settling labor-management disputes with union contractors.
2. Even on all-union projects, varying contract expiration dates among the various employers could result in periodic total stoppages, and increase the pressures on each employer to negotiate wage and benefit increases.
3. At the same time, legalized secondary boycotts would allow union employees of one company to force non-union employees of other contractors off the job site. Despite the prohibition in prior bills of picketing where discrimination on the basis of membership or non-membership in a union is the object of the picketing, the effect would be the same even where the ostensible "object" is something else.

4. Because minority tradesmen have, in some cases been denied membership in the building trade unions, legalization of secondary boycotts would similarly affect the ability of minority contractors to win contract awards, despite the prohibition in prior bills. Likewise, the rights of individual minority tradesmen employed by open-shop contractors would be affected by the ability of unions to force their employers off the site.

5. Common situs would in effect make general contractors responsible for the labor policies of their subcontractors and vice versa.

6. Common situs would "polarize" the construction industry by making job sites either "union" or "non-union," ending the current common practice of "mixed sites" with contractors selected on the basis of competitive bidding alone. The threat of having a total stoppage on the site while legality of the picketing "object" is determined in court would be enough to keep a unionized general contractor from making a contract award to an open-shop subcontractor, or vice versa.

Because of all the above problems that would be created, many small construction firms could be forced out of business. While legalization of secondary boycotts would affect all companies involved in the construction business, the smaller firms would suffer most because they would be least able to survive lengthy picketing, and least able to afford costly litigation to determine the legality of a particular secondary boycott. In addition, prior bills did not exempt residential construction. Thus common situs could be used against the mainly smaller firms that are involved in homebuilding as well as in commercial construction situations.

RESOLVED

The Small Business Legislative Council is opposed to the legalization of common situs picketing, or secondary boycotts, because of the overall detrimental effect on the construction industry and the national economy, but particularly because the impact of legalization would be greatest on the small businesses in all sectors of the construction industry.

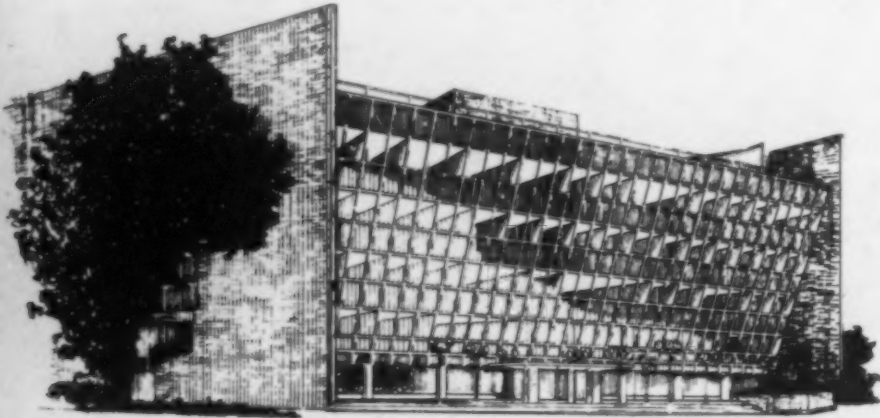
Statement
of the
NATIONAL
ASSOCIATION OF
HOME
BUILDERS
before the

Committee: Small Business Committee
United States Senate

Subject: Housing Industry:
1983 Issues and Priorities

Witness: Jim Schuyler

Date: February 25, 1983
Place: Washington, D.C.



National Housing Center
15th and M Streets, N.W.
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STATEMENT OF
THE NATIONAL ASSOCIATION OF HOME BUILDERS (NAHB)
before
COMMITTEE ON SMALL BUSINESS
UNITED STATES SENATE
on
HOUSING INDUSTRY: 1983 ISSUES AND PRIORITIES
on
February 25, 1983

My name is Jim Schuyler and I am Staff Vice President and Legislative Counsel of the National Association of Home Builders (NAHB). I am testifying on behalf of the more than 105,000 members of NAHB. NAHB is a trade association of the nation's homebuilding industry.

We appreciate the opportunity to present our views on the outlook for housing and our legislative priorities for 1983. This Committee and its highly competent staff have been particularly sensitive to the problems of the homebuilding industry during the past three and one-half years. And this Committee has recognized that this industry is one of the largest and most important "small business" industries in the country.

STATUS OF THE HOUSING INDUSTRY

How do you describe a housing recovery which has already received much attention as one of the only bright spots in the economic picture? I would say the recovery is modest, fragile but real. The signs are mixed, but pointing upward.

- Building permits for January rose at a seasonal rate by almost 16 percent from December. This represented the fifth consecutive month of increase, and suggests a fairly good February for housing production. The actual number of permits rose in all regions between December and January. This increase in permit activity reflects the builder's sense of optimism for recovery this year.
- Housing starts in January were up 36 percent from December, and 96 percent from January 1982. The seasonally adjusted annual starts for January were 1.7 million. Our Economics Division believes that although the high January level is a good sign, it tends to overstate the health of the housing market. The true measure of the housing recovery will come in the spring when the peak building season begins.
- Sales improved dramatically in October and November but slowed in December. The November 1982 rate was the highest in two years, but December sales were nine percent below the November rate.
- The new unsold inventory is generally declining, with a slight increase from November to December. In December 1982, inventory stood at 250,000 or 5.8 months of inventory at current sales rate. The November inventory was the lowest since March 1977.

- Construction unemployment still stood at 20 percent in January of this year, representing over one million people out of work. However, this has dropped from a peak of 22.3 percent in October of 1982.

In 1981 and 1982, the housing industry operated at its lowest levels of production since 1946. Starts in 1982 ended up at 1.07 million, about 46 percent below the peak of the previous cycle in 1978. New home sales were at their lowest level since the Census Bureau began its sales survey in 1963. Construction unemployment averaged 20 percent, the highest level since the Bureau of Labor Statistics began its monthly unemployment survey in the late 1940's. You could say that we in the housing industry (with the exception of some of our builders in Texas and other isolated areas) are very happy that 1982 has ended.

At this time, mortgage interest rates are in the 12 percent to 14 percent range, substantially higher than rates in 1976 when the industry recovered from its last major recession. It should be noted that this modest recovery is underway without the type of government assistance (Brooke-Cranston and tax credit for home purchase) provided to assist recovery from the 1974-75 downturn. That may account in part for the slow and modest recovery now occurring. In fact, our Economics Division has projected that government-assisted production of all types will be down by 50 percent from 1982 to 1983. And most of that limited activity in 1983 will be due to rural housing programs.

OUTLOOK FOR THE HOUSING INDUSTRY

Based upon NAHB's most recent econometric forecast, total housing production is expected to increase by 30 percent to 1.4 million in 1983. Single family activity is expected to reach 950,000 units with multifamily at 450,000. Our most recent forecast has shifted some units out of multifamily and into single family. This is based upon the assumption that multifamily production is not picking up as quickly as anticipated from the decline in Section 8 activity, while single family production is responding more quickly due to the interest rate decline.

Let me be specific about the assumption variables which were used to develop the forecast. We are assuming a decline in AAA bond yields and three month Treasury bills of one full percentage point between fourth quarter 1982 and fourth quarter 1983. The prime rate is projected to drop by almost three percentage points, to 9 percent in the fourth quarter of 1983.

Most forecasters have projected housing production to range between 1.3 million and 1.4 million units in 1983. At that level, this industry can only be expected to make a modest contribution to recovery of the overall economy this year. If housing production increases by 320,000 in 1983, that translates into an increase of 28 percent on a GNP basis for residential construction or \$27 billion in fixed residential investment. This means about 550,000 man-years of employment in construction and related industries. These are virtually all private sector jobs.

But I must bring a note of caution to this discussion. If interest rates begin to head upward ... if the Federal Reserve Board returns to its strict monetarist policy ... or if federal budget deficits remain in the \$200 billion range for the next few years ... our forecast would be as pessimistic as the actual level of activity in 1981 and 1982. That is why I called this recovery fragile ... as fragile as the cherry blossoms which sometimes offer picture postcard beauty to this city in April.

BUDGET

Let me first focus on the federal budget for FY'84 and beyond.

We are deeply troubled by the Administration's FY'84 budget which projects deficits in the \$190 billion range for FY'84 and FY'85. The budget still projects a deficit of \$116.7 billion in FY'88 after five years of relatively strong GNP growth of four percent annually. Of course, that budget deficit is based upon Congress accepting all of the Administration's proposals on spending and taxes. Even more frightening are the Congressional Budget Office out-year baseline projection of an FY'88 deficit of \$267 billion assuming no changes from FY'83 programs and a 3.8 percent annual rate of GNP growth.

Deficits of that size could only open the door to a serious credit crunch in the near future which would weaken, if not destroy, the recovery now underway. In order to reduce these projected deficits, we believe that Congress and the Administration must focus on the "big ticket" items which have been ruled off-limits from the budget process. This must include scaling back on defense spending

and containing the soaring costs of entitlement programs. These programs, coupled with interest payments on the national debt, account for over 80 percent of the federal budget.

Large deficits have an impact on available savings. In the past two years, credit markets were able to raise just under \$500 billion each year in new funds, with the federal government taking over \$200 billion in 1982.

Current projections of the deficit mean that we would have to finance 6.5 percent of the GNP for the federal government alone. This would reduce net investment and weaken if not abort the prospective recovery.

Large deficits also affect the financial markets. They spell uncertainty and grave concern for the money managers as to the direction of long-term government policies. Deficits result in higher interest rates, undermine our trade balance and create a climate for worldwide protectionism.

Let me again stress the importance of working to reduce the federal deficits. We fear that by late summer or early fall the financial markets are going to be under the combined pressure of both the government and the private sector of the economy. And if the government continues to take 6.5 percent of the GNP, then you can be sure that there is not going to be sufficient credit for all sectors of the economy. The highly credit sensitive industries, such as housing, other small business and farming will be pre-empted from the financial market by others, especially the federal government.

At the same time, we can no longer remain silent as the federal commitment to housing for those in need has been virtually wiped out. The Administration proposes a cut of 94 percent in the new budget authority for assisted housing for FY'84. Assisted housing, which represented 4.2 percent of the federal budget in FY'80, would slip to a 0.1 percent share in FY'84. The successful rural housing program of the Farmers Home Administration would be virtually "zeroed out" in FY'84. The replacement proposed by the Administration is an unworkable block grant to the states at about 25 percent of FY'83 financing.

THE DELIVERY SYSTEM

I would like to discuss the state of the housing delivery system. Change -- some have called it revolutionary change -- is the only way to describe our current condition. First, there have been several major changes in the mortgage market.

MORTGAGE CREDIT

A. The share of total mortgages advanced by the thrifts dropped to minus 49.7 percent in the third quarter of 1982 from a peak reached in 1976 of plus 56.7 percent. Or, to put it another way, in 1976 nearly 60 percent of all mortgage money (nearly \$50 billion) came from the thrift industry. In 1977, this share dropped to 50 percent while the total amount increased to \$64.9 billion. By 1981 the share of the S&L mortgage advances dropped to 13.7 percent, or only \$15.8 billion.

More mortgage money is coming from households (up to 20.3 percent in 1981). Mortgage pools, which were non-existent in the early 1960's, jumped to 13 percent of the share in 1981 and were up to a 61.0 percent share of the advances in the third quarter of 1982.

We can no longer assume that the thrift industry will provide an adequate share of our mortgage money in the future.

B. Interest rates reached new record levels. Last Spring, conventional mortgage rates were quoted at close to 20 percent. Even today the FHA rate of 12 percent is very high by historical comparison. We cannot expect mortgage rates to decline to the 5 percent to 6 percent levels that we knew years ago.

C. Mortgage instruments have changed drastically. Today we have dozens of variable rate mortgages. Four years ago most of these instruments were unknown.

At the same time, homebuyers at the lower end of the market returned in record numbers to FHA-insured and VA-guaranteed fixed-rate long-term loans. There is still a consumer preference for the fixed-rate mortgage. In March a survey showed us that one-third of the builders were offering fixed-rate mortgages; in October the number jumped to nearly 70 percent.

D. Long-term money is no longer readily available for mortgages. The mortgage markets are looking for additional long term capital. They have to look to sources other than the savings and loan associations. The mortgage backed security provides the greatest potential for accessing new sources of mortgage funds.

THE HOUSING PRODUCT

The average size of a new single family home increased from 912 square feet in 1950 to a peak of 1,655 square feet in 1978. In 1981 it dropped to 1,550 square feet. However, that doesn't tell the whole story

Major builders are downsizing single family units by 300 to 500 square feet and townhouses by 200 to 300 square feet. This is no longer a gradual decline, but a major change.

The reasons are obvious: smaller families, reduced incomes, increased costs, higher utility bills, higher interest rates, and fewer children.

Additionally, there is the trend toward greater density: condominiums, townhouses, homes built on smaller lots. And this also has meant fewer bedrooms, fewer bathrooms, and the change from expensive basements to slab construction. All of these changes have a major impact on the need for capital, materials and labor. The result of this trend, plus the lower inflation rate, is evident in the prices of homes. Between 1976 and 1979, the median price of new homes sold increased by over 45 percent; between 1979 and 1982 the median price increased by only 10.2 percent. In 1982, the increase was 0.6 percent.

Downsizing is particularly prevalent among the larger builders. Those who are building over 100 units report that 65.6 percent are shifting to smaller units, compared to only 25 percent of the builders who build fewer than 10 units. In addition, larger builders are also shifting to smaller lots more frequently and on a larger scale than are smaller builders.

Almost all builders are shifting into units with some additional luxury features and some (about 15 percent) are shifting to town-houses from single family detached homes.

PRODUCTION CAPACITY

On the whole, we do not expect much pressure on the supply of either labor or materials in 1983.

One area of concern is lumber. Lumber prices have already increased 22 percent since mid-November. They were up 37 percent in the third week of January from November, but declined in the last few weeks.

What this shows is the great sensitivity of lumber prices to housing production. It also shows the potential run-up in prices of lumber once homebuilding activity accelerates.

Lumber prices were very depressed in the past two years and a moderate improvement in prices will very likely reopen some of the mills that have ceased production. This would, of course, be beneficial to the West and South, where the bulk of lumber is being produced.

We are also concerned about the movement of protectionism and oppose the imposition of countervailing duties on the import of Canadian lumber. The Administration is considering action to impose such a duty, which would unnecessarily increase the cost of housing.

Lumber accounts for about 30 percent of the "hard cost" of a house. Let's say that a \$70,000 home has a price tag of \$10,500 for all lumber products. A 30 percent increase would add a direct cost for materials of \$3,650. That alone, assuming that there is no other increase, would add 5.2 percent to the cost of a typical new single family home.

The reduction in the CPI, partly due to moderation in home prices, has resulted in lower interest rates. We must be careful not to reignite the upward trend in prices based upon increases in cost of labor or materials.

LEGISLATIVE PRIORITIES

I would like to submit a brief outline of our key legislative priorities for this year, along with the policy statement adopted by our Board of Directors in Houston last month. I believe that our legislative agenda reflects the concerns I have raised in my testimony today regarding the outlook for the housing industry.

FEDERAL BUDGET -

We urge the Administration and Congress to focus on practical ways to reduce the deficit. They must tackle the "big-ticket" items that heretofore have been ruled off-limits from the budgetcutting process. This would include scaling back on defense spending and containing the soaring costs of entitlement programs that, along with interest payments on the national debt, now account for more than 80 percent of the entire federal budget.

MORTGAGE INVESTMENT TAX CREDIT -

We support a mortgage investment tax credit for investors in residential mortgages as an immediate and positive way to help assure mortgage money will be available in this decade to finance housing for the post-war baby boom.

SAVINGS INCENTIVES FOR HOMEOWNERSHIP -

We support legislation to provide incentives for homeownership through tax exempt savings targeted to housing. Tax-exempt savings programs such as Individual Housing Accounts (IHAs) or Individual Retirement Accounts (IRAs) could be used for a downpayment by first-time buyers.

PENSION FUND INVESTMENT IN MORTGAGES -

We support legislative changes that would remove the statutory and regulatory barriers that now inhibit pension fund investment in residential mortgages. Congress should remove the limitations and burdens that are imposed by statute, agency positions and by interpretations of the restrictive provisions of ERISA. Such legislation would put pension investment in mortgages on an equal basis with other investments.

MORTGAGE REVENUE BONDS -

We support elimination of the December 31, 1983, sunset for single family mortgage revenue bonds issued by states and local governments. The revenue bond program is an important source of housing finance.

REGULATORY REFORM -

We support regulatory reform legislation which includes the concept of the two-House veto and the requirement that federal agencies perform cost/benefit analysis before submitting rules or regulations for final approval. Congress should carefully review and analyze existing rules and regulations to reduce or eliminate unnecessary compliance, cost and burden.

TRUSTS FOR INVESTMENTS IN MORTGAGES (TIMS) -

We support the concept of legislation which would promote the development of conventional mortgage-backed securities programs.

MULTIFAMILY -

We support continuation of present 15-year depreciation allowances for structures. We urge the development of new multifamily financing vehicles including a new federal rental housing production program.

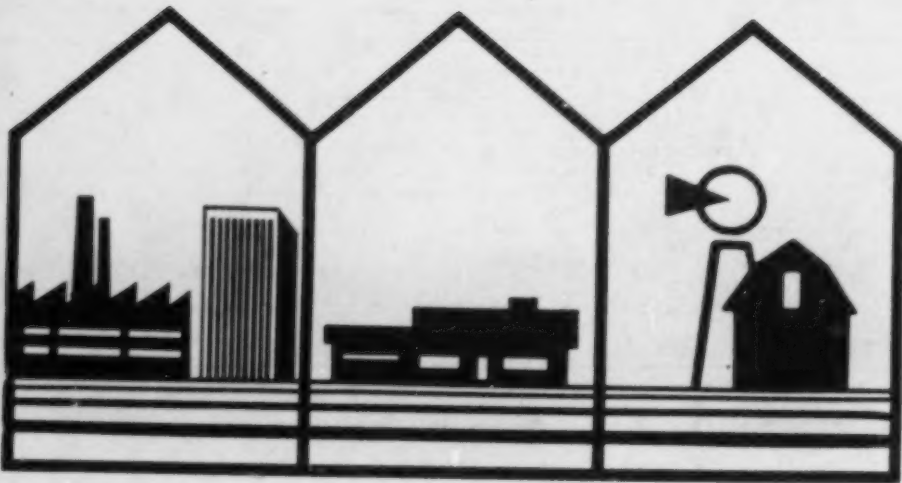
RURAL HOUSING -

We oppose the Administration's proposal to convert the FmHA housing programs to a block grant program, and support funding for these programs at FY'83 levels.

TIMBER PRICES -

We support the termination of existing contracts for national forest timber to aid financially troubled timber companies. We oppose the imposition of countervailing import duties on Canadian softwood lumber, because such duties would increase the purchase price of a home.

Thank you for the opportunity to present our views. Indeed the future of this industry and the overall economy is in the hands of Congress -- along with the Administration and the FED -- in the next few months. We stand ready to assist this Committee and its staff in any way we can.



Statement of the
NATIONAL ASSOCIATION OF REALTORS®
 THE WORLD'S LARGEST TRADE ASSOCIATION

TO: SENATE SMALL BUSINESS COMMITTEE

ON: ISSUES OF MAJOR INTEREST TO REALTORS® AND
 TO HOUSING

BY: GIL THURM

DATE: FEBRUARY 25, 1983

STATEMENT
on behalf of the
NATIONAL ASSOCIATION OF REALTORS®
before the
SENATE SMALL BUSINESS COMMITTEE
by
GIL THURM
Vice President and Legislative Counsel
of Government Affairs
February 25, 1983

I am Gil Thurm, Vice President and Legislative Counsel of the Government Affairs Division of the NATIONAL ASSOCIATION OF REALTORS®.

On behalf of the over 500,000 members of the NATIONAL ASSOCIATION OF REALTORS®, we appreciate the opportunity to submit to you the issues of major importance at this time to REALTORS® and to housing.

Two issues of major importance will be addressed in depth in this statement since Congress is focusing on them now: the Treatment of Self-employed Workers in the Social Security Reform Recommendations and Federal Budget Deficits. Briefing papers on other major issues of interest to our members are also attached.

REALTOR® RECOMMENDATIONS ON THE SOCIAL SECURITY REFORM PROPOSAL

The National Commission on Social Security Reform (Commission) proposed a combination of ways to close one-half to two-thirds of the gap between receipts and benefit payments in the Social Security program.

RECOMMENDATIONS

We recommend support for the Commission's compromise with one important technical change. We recommend that other provisions be identified to close the entire gap between receipts and benefits. The

Trust Fund must be made whole in fairness to all Americans.

However, we strongly recommend an important technical change:
 EITHER THE TAX ON SELF-EMPLOYED WORKERS BE INCREASED ONLY BY THE
 SAME PERCENTAGE AS EMPLOYEE WORKERS OR THE PROPOSED 50%
 DEDUCTIBILITY OF THE SELF-EMPLOYED TAX BE CHANGED TO A 25% TAX
 CREDIT, A PROPOSAL THE COMMISSION ITSELF CONSIDERED AS A REASONABLE
 ALTERNATIVE.

The reasons for recommending this technical change are:

- (1) The self-employed workers are already paying enough taxes to cover their anticipated benefits, in sharp contrast to other participants.
- (2) The tax increase for self-employed workers would increase their tax burden by 20 to 40%, or \$300 to \$600 more taxes in 1984 and in each and every year in the future, \$3,600 in 10 years. In sharp and unfair contrast, employee workers or employers would not pay any new tax increases until and only during 1988 and 1989 and then only tax increases of 0.3 percent, or \$90 for two years, \$180 in 10 years.
- (3) The resulting tax burden would be greater on those least able to pay, namely, lower income workers.
- (4) Self-employed workers would be hurt in every state.
- (5) The smallest of small business would be handicapped.
- (6) Business concentration would increase.
- (7) The dream of self-employment for many Americans should be encouraged not discouraged.
- (8) Inventive and energetic workers must be encouraged, not discouraged.
- (9) Self-employed workers should be allowed to work and continue with a full and productive life beyond age 60 or 65.
- (10) Women would be treated most unfairly.

DISCUSSION1. Self-employed workers already pay their own way

We contacted the Social Security Administration directly and through Members of the Congress and learned that they had not bothered to collect data on whether large categories of workers are paying enough into programs that they can expect to receive benefits from. However, we obtained data from other government sources to convince us that the self-employed are likely paying their fair share, enough to cover anticipated benefit payments. This occurs because self-employed workers pay in taxes over a longer period of time and draw benefits over a shorter period of time:

- The self-employed age 65 or older represent 27.2% of all employed persons over 64. In contrast, the self-employed account for only 8.9% of all employed persons of any age. Thus, the self-employed, as an actuarial group, postpone benefits far longer than employee workers and pay self-employed taxes longer than employee workers.^{1/}
- A rather recent study shows that by age 63, 21.2% of employed workers have left the work force while only 11.6% of self-employed workers had retired.^{2/}

^{1/} U.S. Bureau of Labor Statistics, Employment and Earnings.

^{2/} Joseph F. Quinn, "Labor Force Participation Patterns of older Self-Employed Workers," Social Security Bulletin, April 1980, Volume 43, No. 4, Pages 17-28. There are many obvious reasons for this phenomenon, since the self-employed are not affected by compulsory retirement rules and are encouraged to continue working by the ability to be flexible with one's own working hours. Nonetheless, the self-employed are disproportionately paying into the fund compared to employee workers.

- As many as 12% of self-employed workers have already qualified for Social Security through work as an employee worker before becoming self-employed. The contribution to the System made by these self-employed is, therefore, supplementary to the contributions required of them to qualify for Old Age, Survivors and Disability benefits.

2. The Commission's proposal for increasing the self-employed workers tax is unfair and discriminatory in comparison with employee workers

Presently, the self-employed Social Security tax rate is 9.35 percent compared with 6.7 percent for an employee and 13.4 percent combined for employee-employer. Of this, the self-employed tax rate for the OASDI alone (exclusive of Health Insurance (HI)) is 8.05 percent compared to 5.40 percent for the employee workers, and 10.80 percent combined for the employee-employer. The Social Security Commission has recommended that the self-employed Social Security tax rate be increased to the combined employee-employer OASDI payroll tax rate which is to be 11.4 percent in 1984. The self-employed HI payroll tax rate would remain 1.3 percent for 1984. The self-employed, according to the Social Security Commission's recommendations, would have their Social Security taxes increased from 8.05 percent to 11.40 percent, a \$603 increase, or 41.6 percent tax increase for a typical self-employed worker (see Table 5).

In conjunction with this self-employed Social Security tax increase, the Commission would allow the self-employed a personal

income tax deduction equal to one-half the OASDI Social Security tax payment. Apparently this idea was adopted by the Commission in the belief that the huge Social Security tax increase would be offset from personal income tax, resulting in little net increased out-of-pocket loss to the self-employed worker. An analysis of this proposal, including the income tax deduction, indicates, however, that there would be little offsetting effect for the vast majority of the self-employed and the increase in tax burden on self-employed workers would be far greater than the new tax burden on employee workers, a \$439 increase, or 30.3% increase for a typical self-employed worker, after adjusting for a personal income tax deduction.

Beginning in 1984 the Commission's proposal would increase the after-tax burden on the self-employed person by the largest increase in U.S. history. In sharp contrast, an employee earning the same income would experience no increase in after-tax burden in 1984, 1985, 1986 and 1987. Only in 1988 would the employee worker experience a modest increase and only by bringing the established increase for 1990 forward to 1988 and 1989. In 1990 and afterwards the employee worker would experience no increase in after-tax burden. Under the Commission's proposal, the 0.3 percentage point increase in 1984 would be totally offset by a refundable tax credit. For 1985, the increase was previously scheduled by the tax law passed in 1977. Thus, the tax burden increase proposed on employee workers is zero except for 2 years, 1988 and 1989, and then only a modest increase is proposed (see Tables 1 and 2).

TABLE 1

THE CHANGE PROPOSED BY THE COMMISSION
ON OASDI TAX ON EMPLOYEE WORKERS IN 1984 ^{1/}

	Current Law	Proposed		
	Effective Tax Rate	Effective Tax Rate ^{2/}	Increase in Tax Burden	
			Dollars	Percent
\$ 5,000	5.40%	5.40%	0	0.0
\$ 10,000	5.40%	5.40%	0	0.0
\$ 14,000	5.40%	5.40%	0	0.0
\$ 18,000	5.40%	5.40%	0	0.0
\$ 22,000	5.40%	5.40%	0	0.0
\$ 34,000	5.40%	5.40%	0	0.0
\$ 40,000	5.06%	5.06%	0	0.0
\$ 54,000	3.75%	3.75%	0	0.0
\$ 70,000	2.89%	2.89%	0	0.0
\$ 90,000	2.25%	2.25%	0	0.0
\$120,000	1.69%	1.69%	0	0.0
\$170,000	1.19%	1.19%	0	0.0

^{1/} Maximum taxable earnings of \$37,500

^{2/} Reflects refundable tax credit proposed for employee workers

TABLE 2

THE CHANGE PROPOSED BY THE COMMISSION
ON OASDI TAX ON EMPLOYEE WORKERS IN 1985 ^{1/}

	Current Law	Proposed		
	Effective Tax Rate	Effective Tax Rate	Increase in Tax Burden	
			Dollars	Percent
\$ 5,000	5.70%	5.70%	0	0.0
\$ 10,000	5.70%	5.70%	0	0.0
\$ 14,000	5.70%	5.70%	0	0.0
\$ 18,000	5.70%	5.70%	0	0.0
\$ 22,000	5.70%	5.70%	0	0.0
\$ 34,000	5.70%	5.70%	0	0.0
\$ 40,000	5.70%	5.70%	0	0.0
\$ 54,000	4.28%	4.28%	0	0.0
\$ 70,000	3.30%	3.30%	0	0.0
\$ 90,000	2.57%	2.57%	0	0.0
\$120,000	1.92%	1.92%	0	0.0
\$170,000	1.36%	1.36%	0	0.0

^{1/} Maximum taxable earnings of \$40,500

In sharp and unfair contrast, the tax burden would increase for the self-employed workers at all income levels (see Tables 3 and 4).

TABLE 3
THE CHANGE PROPOSED BY THE COMMISSION
ON OASDI TAX ON SELF-EMPLOYED WORKERS IN 1984 ^{1/}

	Current Law		Proposed	
	Effective Tax Rate	Effective Tax Rate 2/	Increase in Tax Burden	
			Dollars	Percent
\$ 5,000	8.05%	11.40%	168	41.6%
\$ 10,000	8.05%	10.72%	267	33.2%
\$ 14,000	8.05%	10.60%	357	31.7%
\$ 18,000	8.05%	10.48%	439	30.7%
\$ 22,000	8.05%	10.37%	510	28.8%
\$ 34,000	8.05%	9.80%	595	21.7%
\$ 40,000	7.55%	8.92%	549	18.1%
\$ 54,000	5.59%	6.41%	442	14.7%
\$ 70,000	4.31%	4.82%	355	11.8%
\$ 90,000	3.35%	3.68%	293	9.9%
\$120,000	2.52%	2.69%	209	6.7%
\$170,000	1.78%	1.89%	194	6.2%

^{1/} Maximum taxable earnings of \$37,500

^{2/} The increase in the tax burden is calculated by adjusting for the 50 percent deductibility of OASDI tax taken from personal income taxes, based on the effective personal and income tax rate for each income level.

TABLE 4
THE CHANGE PROPOSED BY THE COMMISSION
ON OASDI TAX ON SELF-EMPLOYED WORKERS IN 1985 ^{1/}

	Current Law		Proposed	
	Effective Tax Rate	Effective Tax Rate 2/	Increase in Tax Burden	
			Dollars	Percent
\$ 5,000	8.55%	11.40%	143	33.3%
\$ 10,000	8.55%	10.72%	217	25.4%
\$ 14,000	8.55%	10.60%	287	24.0%
\$ 18,000	8.55%	10.48%	347	22.6%
\$ 22,000	8.55%	10.37%	400	21.3%
\$ 34,000	8.55%	9.80%	425	14.6%
\$ 40,000	8.55%	9.52%	388	11.3%
\$ 54,000	6.41%	6.93%	279	8.1%
\$ 70,000	4.95%	5.21%	184	5.3%
\$ 90,000	3.85%	3.98%	119	3.4%
\$120,000	2.86%	2.91%	29	1.7%
\$170,000	2.04%	2.04%	0	0.0%

^{1/} Maximum taxable earnings of \$40,500

^{2/} The increase in the tax burden is calculated by adjusting for the 50 percent deductibility of OASDI tax taken from personal income taxes, based on the effective personal and income tax rate for each income level.

The impact of the Commission's proposal on a typical self-employed worker would be a \$439 increase (or 30%) in tax burden in 1984. The increase would be 23 percent in 1985 (see Tables 5 and 6).

TABLE 5

COMMISSION'S PROPOSED OASDI TAX BURDEN ON A TYPICAL SELF-EMPLOYED WORKER AND EMPLOYEE WORKER WITH THE SAME INCOME IN 1984 ^{1/}

	Current Law				Commission's Proposal				Increase			
	Before-Tax		After-Tax ^{2/}		Before-Tax		After-Tax ^{2/}		Before-Tax		After-Tax ^{2/}	
	Rate	\$	Rate	\$	Rate	\$	Rate	\$	%	\$	%	\$
Self-Employed	8.05%	\$1,449	8.05%	\$1,449	11.40%	\$2,052	10.49%	\$1,888	41.6%	\$603	30.3%	\$439
Employee	5.40%	\$ 972	5.40%	\$ 972	5.70%	\$1,026	5.40%	\$ 972	5.6%	\$ 54	0.0%	0
Employer	5.40%	\$ 972	3.62%	\$ 651	5.70%	\$1,026	3.82%	\$ 687	5.6%	\$ 54	5.5%	\$ 36

TABLE 6

COMMISSION'S PROPOSED OASDI TAX BURDEN ON A TYPICAL SELF-EMPLOYED WORKER AND EMPLOYEE WORKER WITH THE SAME INCOME IN 1985, 1986, AND 1987 ^{1/}

	Current Law				Commission's Proposal				Increase			
	Before-Tax		After-Tax ^{2/}		Before-Tax		After-Tax ^{2/}		Before-Tax		After-Tax ^{2/}	
	Rate	\$	Rate	\$	Rate	\$	Rate	\$	%	\$	%	\$
Self-Employed	8.55%	\$1,539	8.55%	\$1,539	11.40%	\$2,052	10.49%	\$1,888	33.3%	\$513	22.7%	\$349
Employee	5.70%	\$1,026	5.70%	\$1,026	5.70%	\$1,026	5.70%	\$1,026	0.0%	0	0.0%	0
Employer	5.70%	\$1,026	3.82%	\$ 687	5.70%	\$1,026	3.82%	\$ 687	0.0%	0	0.0%	0

^{1/} Typical self-employed person has an income of \$18,000. The average income for REALTOR® sales persons is \$18,000.

^{2/} After-tax adjustment for deduction for self-employed and employer and credit for employees in 1984. For employer, assumes average effective corporate income tax for 1982 of 33%.

The tax burden on the self-employed would continue in every future year beyond 1988. During the next 10 years the unfair tax burden would be approximately \$3,600 for a typical self-employed worker above what would be paid by the employee worker. Thus, the tax burden would increase about 25% higher for the average self-employed worker than the increase in tax burden for the employee worker.

If a change in the tax structure is necessary, a 25 percent tax credit would reduce most of the harm of this proposed tax increase even with 50 percent deductibility. The loss of personal income tax receipts would average only about \$0.9 billion each year. We will be pleased to examine other alternatives to our proposed technical improvement (see Tables 7 and 8).

TABLE 7
COMMISSION'S PROPOSED SELF-EMPLOYED SOCIAL SECURITY TAX INCREASE
(Billions of Dollars)

	1984	1985	1986	1987	1988	1989	Total 84-89
Commission's proposed tax Increase in Revenues to Social Security Trust Fund ^{1/}	\$0.9	\$2.8	\$3.1	\$3.4	\$3.6	\$3.8	\$17.6
Commission Proposed 50 Percent Tax Deduction from personal taxable income thus reducing general revenues ^{1/}	- 0.61 ^{2/}	1.91	2.12	2.32	2.45	2.59	12.0
Alternative 25% Tax Credit Proposals--further reduction in General Revenues	- 0.26 ^{2/}	0.79	0.87	0.96	1.01	1.07	4.96
Net tax burden on Self-Employed	0.03	0.10	0.11	0.12	0.14	0.14	0.64

^{1/} Source: National Commission on Social Security Reform, Actuarial Cost Estimates for OASDI and HI and for Various Possible Changes in OASDI. Other estimates range from \$9 billion to \$12 billion.

^{2/} By contrast, Commission's proposal for refundable tax credit for employee workers in 1984 is estimated to cost \$9.4 billion.

TABLE 8

COMMISSIONS PROPOSED SOCIAL SECURITY TAX INCREASE
FOR A TYPICAL SELF EMPLOYED WORKER WITH
INCOME OF \$18,000

	1984	1985	1986	1987	1988	1989	84-89
Tax Under Current Law	\$1449	\$1539	\$1539	\$1539	\$1539	\$1539	--
Commissions's after tax increase	439	349	349	349	468	468	\$2422
Alternative after tax increase (25% tax credit in placing 50% deductibility)	90	0	0	0	98	98	286

3. The Commission's proposed self-employed worker tax increase would be regressive and greatly increase the tax burden on lower income self-employed workers in contrast to upper income self-employed workers

This is clear by reviewing Tables 3 and 4. The tax burden for lower income self-employed workers would increase by 20 to 40 percent while the increase in tax burden for upper income self-employed would only go as high as 10 percent.

The Commission's proposal of the deductibility of one-half the OASDI tax is of limited value except for the very few self-employed persons with very high incomes and subject to the 50 percent personal income tax rate. These few rich self-employed people would be treated fairly while 99 percent of the self-employed workers with lower incomes would experience an increase in tax burden.

The Commission may have seen a "tax deduction" as an offset that would result in little net increase in tax payments by the self-employed workers as indicated by Commission staff working papers (See Commission Memorandum 56). For example, the following footnote from the Commission's options paper:

In conjunction with this proposal, a tax credit for the self-employed equal to 25% of the self-employment tax could be provided. Alternatively, 50% of the payroll tax paid by the self-employed could be made tax deductible as a business expense. (Emphasis supplied.)

Clearly, the tax deduction does not provide a fair offset. It approaches full offset only for those self-employed taxpayers in the highest of tax brackets.

Even the tax credit, if not made refundable, would not remove the burden that this self-employed tax increase would place on the lowest income self-employed workers that have little or no income tax liability.

When considering proposed benefit changes, the Commission proposes that the tax burden should fall on those most able to afford it -- Social Security recipients whose other income exceeds \$20,000 -- who would pay personal income taxes for the first time on their Social Security benefit payments. The Commission in sharp contrast recommends perhaps the greatest share of the tax change in the case of self-employed workers, on those least able to bear it. In fact, the tax increase on the self-employed workers is the largest tax increase in U.S. history.

This significant difference in tax treatment suggests that the results of the Commission's proposal affecting self-employed workers may not have been intended or understood.

4. The Commission's proposed tax increase would be unfair to self-employed workers in every State of the Union

In the State of Texas, for example, 483,982 self-employed workers would pay \$731.3 million increase in after-tax personal income tax burden from 1984 to 1989, that is, if the self-employed workers in Texas are not driven to abandon their choice of being self-employed because of this heavy tax burden (see Table 7).

TABLE 9

INCREASE IN AFTER-TAX BURDEN ON SELF-EMPLOYED WORKERS
IN EACH STATE: 1984-1989

	Number	Excessive Tax ^{1/}		Number	Excessive Tax ^{1/}
Alabama	101,432	\$ 153,273,795	Nebraska	92,388	\$ 139,607,416
Alaska	12,362	18,680,206	Nevada	22,040	33,304,622
Arizona	64,653	97,697,085	New Hampshire	29,396	44,420,267
Arkansas	85,735	129,554,074	New Jersey	158,628	239,702,614
California	803,909	1,214,786,097	New Mexico	37,620	56,847,545
Colorado	110,688	167,260,528	New York	402,160	607,703,580
Connecticut	74,555	112,659,987	North Carolina	181,783	274,692,112
Delaware	12,796	19,336,023	North Dakota	46,264	69,909,485
D. C.	11,104	16,779,243	Ohio	246,735	372,841,015
Florida	275,690	416,594,887	Oklahoma	126,537	191,209,936
Georgia	147,001	222,133,066	Oregon	102,921	155,523,822
Hawaii	23,388	35,341,584	Pennsylvania	292,178	441,509,888
Idaho	45,661	68,998,292	Rhode Island	19,495	29,458,875
Illinois	292,254	441,624,731	South Carolina	77,779	117,531,770
Indiana	138,277	208,950,238	South Dakota	51,184	77,344,092
Iowa	150,356	227,202,803	Tennessee	136,611	206,432,747
Kansas	108,905	164,566,238	Texas	483,982	731,344,723
Kentucky	106,567	161,033,289	Utah	39,774	60,102,452
Louisiana	104,617	158,086,646	Vermont	21,688	32,772,715
Maine	38,133	57,622,739	Virginia	124,498	188,128,805
Maryland	91,061	137,602,187	Washington	130,466	197,147,044
Massachusetts	127,346	192,432,415	West Virginia	36,922	55,792,798
Michigan	187,536	283,385,465	Wisconsin	147,862	223,434,122
Minnesota	183,037	276,587,030	Wyoming	16,962	25,631,261
Mississippi	74,040	111,881,771			
Missouri	182,079	275,139,397			
Montana	38,645	58,396,421			
			TOTAL U.S.	6,617,700 ^{2/}	10,000,000,000

^{1/} Based on a net tax increase of \$10 billion over 1984-89.

^{2/} This figure, based on the 1980 Census, is 1.861 million less than the number of self-employed workers reported by the Bureau of Labor Statistics which is based on the Current Population Survey (CPS). The cause of this discrepancy is believed to be due to a more expansive definition of self-employed by the CPS.

Source: U.S. Department of Commerce, Bureau of the Census, 1980 Census of Population and Housing, Provisional Estimates of Social, Economic, and Housing Characteristics, PEC80-S1-1.

5. The Commission's proposal would hurt the smallest of small business

Self-employed workers are already disadvantaged by the fact:

- (1) They do not have the financial protection from unemployment which is provided to employed workers through unemployment compensation programs which are, in part, now subsidized by loans from the Federal government.
- (2) They do not have the protection from liability which the corporate form provides for most employed workers through corporations' limited liability.
- (3) They are not able to treat as a business expense the cost of insurance premiums for health insurance. This contrasts with the ability of employers to expense this common item of cost of employee workers.
- (4) They are not able to treat as a business expense all of the costs of providing pensions.

In addition, deductions of the cost of employed workers, most of whom work for corporations, are of much greater value than are deductions for self-employed workers. The average effective income tax rate (Federal, State and local) on corporations is about 33 percent compared to an average 18 percent or less for self-employed workers. Thus, the Commission's proposal to allow a 50 percent deduction of the OASDI tax for both employee and employer, and to allow a 50 percent deduction for OASDI for the self-employed, does not have the same value. It is much less valuable to the self-employed.

6. The Commission's proposal for heavily taxing the self-employed workers would likely increase business concentration

Small, self-employed business and professionals would find the tax burden too great and merge with larger businesses, reducing competition which benefits the American consumer.

7. The Commission's huge tax increase on self-employment would discourage the dream of many Americans to be self-employed

Many of us want to be our own boss, to work according to our own schedules, to innovate in our own way, to reap rewards of our own efforts and to call no one else our supervisor.

The huge tax increase proposed by the Commission would penalize more than 6 million Americans who choose to be their own boss and make it difficult if not impossible to achieve their dream of working as a self-employed person.

The American dream must be kept alive. It must not be undermined by unfair and unwise tax increases. The American dream of self-employment should remain viable in the future as it has in the past.

8. The Commission's proposal would reduce innovation and energy in the work place

Some of the nation's greatest inventions came from inventors who were self-employed. Every family has benefited from the automatic development and printing of photographs, as was pioneered by inventor Land. Some of our best designed buildings were done by architects who were self-employed. New products have been introduced and provided for consumers across the entire economy by direct sales people. Some of the best art and music has come from self-employed people. We find among the self-employed: inventors, architects, doctors, nurses, builders, beauticians, taxicab drivers, truck drivers, musicians, direct sales people,

farmers, and others. They are all providing an incentive for extra work, extra pride and extra accomplishment from which all Americans have benefited.

The proposed tax increase would dampen incentive for unique and important contributions to our society. Particularly at this time of a fragile economic recovery we should not discourage self-employment which leads to important innovations, risk-taking and extra energy from people who choose to be their own boss.

Already we have discouraged self-employment by the existing heavy payroll tax burden on the self-employed who under existing law pay 150 percent of the tax burden on employee workers and who would be required under the Commission proposal to pay 200 percent. Since the 150 percent tax burden was imposed 30 years ago, the proportion of the work force who are self-employed has dropped from 14 to 8 percent. The existing tax burden was a reason for that drop and a further increase in that tax burden could cause the drop to be even greater and at a greater loss for all American households who count on the service and products of the self-employed (see Table 10).

TABLE 10
SELF-EMPLOYED WORKERS

Year	Number* (millions)	Percent of Civilian Labor Force
1950	8.624	13.9%
1965	8.520	11.4%
1980	8.478	8.1%

*Represent total self-employed; only about 6 1/2 million are covered by Social Security.

Source: U.S. Department of Commerce, Bureau of the Census.

Even the most cautious observer can realize from these statistics that the condition of self-employed workers is already fragile because there has been no expansion in their numbers and in fact the proportion of Americans who are self-employed has declined.

9. The Commission proposal would reduce the incentive for self-employed workers to continue with a full and productive life

There tends to be a larger proportion of self-employed workers that are working after age 65 than in the case of employed workers. Obviously, when they work longer of their own choice, they tend to start drawing retirement benefit payments at a later age. Self-employment increases the opportunities for older workers to remain active. This tax increase is anti older people.

10. The Commission's proposal would be unfair to women

Women, who are already discriminated against by the structure of the Social Security System, will have the disparity of their payments to benefits increased under the new self-employed proposal.

It is recognized that Social Security under the current system is discriminatory to any woman who works to supplement the family income since her benefits would have been provided by her husband's contribution even if she did not contribute on her own. Since self-employed women are, even now, contributing more than women employees, there can be no truth to the assertion that they are getting more benefits than they are paying for.

It is a bitter irony that the Commission's recommendations purport to help women through provisions which allow even divorced wives and remarried widows to receive benefits, while at the same time the Commission's proposal for self-employed workers further taxes the women who will need coverage less.

This is especially important since the number of women self-employed workers has more than doubled in the last few years while the total number of self-employed has decreased slightly in the last 30 years. It is important to the NATIONAL ASSOCIATION OF REALTORS® since nearly 300,000 of our members are self-employed women.

Women carry an important responsibility in our society by bearing the next generation of Americans. In many cases, they also carry the responsibility of rearing the next generation. Self-employment is particularly helpful to women so that they can exit and enter the work place and so they can have gainful work that will match their unique schedule requirements.

Self-employed women have grown in the last 30 years from 11 percent of self-employed workers to 26 percent in 1980 and estimated to be 30 percent in 1984. The trend should continue in the future and we can expect women to be a larger percentage of the self-employed than men in the long run.

It is particularly important -- in fairness to women and in order to take care of their unique needs for flexibility in their careers -- not to enact a huge and unfair and regressive tax on self-employed women (see Table 11).

TABLE 11
UNFAIR TAX BURDEN ON SELF-EMPLOYED WOMEN

Years	Millions of Women	Percent of Self-employed	Additional Annual Tax Burden
1950	1.0	11	N/A
1965	1.6	18	N/A
1980	2.2	26	N/A
1984 ^{1/}	2.5	30	\$450 million
1995 ^{I/}	3.4	40	\$600 million
2010 ^{I/}	4.7	55	\$800 million

^{1/} In constant \$1982.

CONCLUSION

If Congress feels that the traditional tax structure of self-employed workers must be changed, the only tax that can be fair is to change the 50 percent deductibility provision to a 25 percent tax credit in each and every future year.

REALTOR RECOMMENDATIONS ON THE FEDERAL BUDGETThe Short-term Outlook for HousingThe Importance of Controlling Federal Deficits

While the current upward trend is encouraging, it will take some time for the housing sector to return to full recovery. The fragile recovery we are seeing for the housing industry must be protected and nurtured in order to encourage a strong economic recovery for all industries. The key to maintaining this environment of lower interest rates so crucial to housing is Congressional control over expanding deficits.

Last year's Budget Resolution calling for a lowered deficit, followed by two Reconciliation bills which put into law spending reductions and tax increases, helped build the confidence of the money market to allow that decline in interest rates.

This year the Congress will have to demonstrate similar fiscal responsibility to maintain the current interest rate level and to allow interest rates to fall even further. New spending programs aimed at special concerns like unemployment or housing will not be as effective as deficit control. Even the Congressional Budget Office has pointed out the futility of throwing money at those concerns:

- First, unemployment is so large that no jobs programs could help more than a small fraction of the unemployed. No housing stimulus bill could house the nation.
- Second, and most importantly, the resulting increase in the deficit could exert upward pressure on interest rates and reduce the supply of mortgage credit, thereby shattering renewed dreams of homeownership.

In order to satisfy the housing needs of Americans, the Congress must take action to decrease the proportion of available capital that is syphoned away to finance federal deficits. The housing recovery will never happen under the current projection of 200 billion dollar deficits being added each year to a national debt of 1.3 trillion dollars.

RECOMMENDATIONS

We recommend a DOUBLE FREEZE:

- A FREEZE ON AGGREGATE REAL SPENDING;
- A FREEZE ON CHANGES IN TAX RATES.

Specifically, we recommend that the First Concurrent Budget Resolution and Reconciliation Acts:

- (1) allow aggregate spending to increase by no more than the 5% growth of inflation in 1984, and propose the same for 1985 and 1986. (Some programs could increase faster and some increase slower or decrease to achieve no growth overall, after adjusting for inflation.)

- (2) require no across-the-board tax rate increase or decrease in 1983 or 1984, which would require elimination of the 1983, 10%, personal income tax rate cut (which primarily stimulates consumption and not savings and investment anyway) and would require moving up by one year the effective date for indexing personal income tax brackets to January 1, 1984;

- (3) reject any real across-the-board tax rate increases or decreases in 1985 or 1986, with or without a trigger.

RESULTS

The fiscal results of our recommendations are summarized in Table 1.

The freeze on spending would slow the growth of Federal outlays until it is made less of a burden on the average household either through lower taxation or borrowing, and be comparable to the average of the last 10 years, from a record 25.2% of GNP in 1983 to 22.3% by 1986 and 21.6% by 1987; the average for the last 10 years (1973-1983) was 21.6%.

This would require the Congress to consider limiting the growth of Cost of Living Adjustments (COLA) applied to public programs to match the growth of Cost of Living Adjustments in the private sector, which range from one-half to two-thirds of the change in the Consumer Price Index. The limited COLAs should be applied to entitlements, retirement, compensation and other programs across the entire government.

TABLE 1

MULTIPLE-YEAR DOUBLE FREEZE:
AGGREGATE FREEZE ON REAL SPENDING AND
FREEZE ON ACROSS-THE-BOARD TAX RATES

	ADMINISTRATION		DOUBLE FREEZE PROPOSAL <u>1/</u>		ANNUAL DIFFERENCE		Accumulated Difference 1984 to current year
	Dollars Billion	% of GNP	Dollars Billion	% of GNP	Dollars Billion	Percent	Dollars Billion
<u>FY 1984</u>							
Outlays	848.5	24.3	840.0	24.1	-8.5	1.0	-8.5
Receipts	659.7	18.9	702.0	19.7	42.3	6.4	42.3
Deficit	-188.8	5.4	-138.0	4.0	-50.8	26.9	-50.8
<u>FY 1985</u>							
Outlays	918.5	24.1	886.1	23.3	-32.4	3.5	-40.9
Receipts	724.3	19.0	774.5	19.9	50.2	6.9	92.5
Deficit	-194.2	5.1	-111.6	4.3	-82.6	42.5	-133.4
<u>FY 1986</u>							
Outlays	989.6	23.9	926.0	22.3	-63.6	6.4	-104.5
Receipts	841.9	20.3	907.5 ^{2/}	21.4	65.6 ^{2/}	7.8 ^{2/}	158.1 ^{2/}
Deficit	-147.7	3.6	-18.5	0.4	-129.2	87.5	-262.6
<u>FY 1987</u>							
Outlays	1,061.8	23.7	967.7	21.6	-94.1	8.9	-198.6
Receipts	926.1	20.6	1,014.6 ^{2/}	22.1	88.5 ^{2/}	9.6 ^{2/}	246.6 ^{2/}
Deficit/ Surplus	-135.7	3.0	+46.9	1.0	-182.6	134.6	-445.2

1/ Accepted Administration's economic assumptions before applying Double Freeze, which improves the outlook for economic performance, which is reflected in the Double Freeze receipt estimates and differences.

2/ No need for trigger tax increase, so tax receipts are estimated without tax increase.

This would also require the Congress to consider slowing the growth of Defense to 5 to 7% above the inflation rate, a range previously supported by Presidents Reagan, Carter and Ford.

In addition, other modest changes, discretionary and legislative, in all program areas, will be required.

The results could be a reduction in spending of \$64 billion during the 1984-1986 time period -- \$8.5 billion lower in 1984, \$32 billion lower in 1985 and \$64 billion lower in 1986 (see Table 1) -- compared to President Reagan's spending proposals (Table 1). Reductions would likely be made in Defense and entitlements (see Table 2).

TABLE 2
COMPOSITION OF FEDERAL SPENDING
BEFORE AND AFTER APPLYING FREEZE ON AGGREGATE SPENDING
1984-1986
(Percentage of GNP)

	1982	1983	1984		1986		Difference
	Actual	Administration	Administration	REALTORS	Administration	REALTORS	
National Security	6.2%	6.7%	6.9%	6.8%	7.2%	6.9%	-0.3
Entitlements:	11.4%	12.1%	11.2%	11.1%	10.8%	10.5%	-0.3
Social Security	5.0%	5.3%	5.1%	5.1%	5.0%	4.9%	-0.1
Medicare/Medicaid	2.2%	2.4%	2.4%	2.4%	2.7%	2.6%	-0.1
Other Entitlements	3.7%	3.9%	3.4%	3.4%	3.0%	2.9%	-0.1
Farm Supports	0.4%	0.6%	0.3%	0.3%	0.1%	0.1%	0
Non-Defense Discretionary	4.6%	4.5%	4.4%	4.4%	4.1%	4.3%	+0.2
Net Interest	2.8%	2.7%	2.7%	2.8%	2.8%	2.9%	+0.1
Offsetting Receipts	-0.9%	-1.0%	-1.0%	-1.0%	-1.0%	-1.0%	0
	24.0%	25.0%	24.3%	24.2%	23.9%	22.3%	-0.4

Source: Congressional Budget Office, Budget of the United States, Fiscal Year 1984 and NATIONAL ASSOCIATION OF REALTORS.

The multi-year freeze in spending alone would produce a significantly better fiscal condition compared to the President's proposal of a one-year spending freeze and then spending growth as usual. By 1986, spending would be \$104.5 billion less, the trigger tax in 1986 would not be necessary and tax receipts would be \$46 billion lower, the deficit would be down to \$129 billion, trending to zero by 1989 (see Table 3).

TABLE 3

MULTI-YEAR AGGREGATE SPENDING FREEZE IN COMPARISON WITH
ADMINISTRATION'S AGGREGATE SPENDING FREEZE FOR ONE YEAR, 1984
1984-1987

	ADMINISTRATION		FREEZE		ANNUAL DIFFERENCE		Accumulated Difference 1984 to current year
	Dollars Billion	% of GNP	Dollars Billion	% of GNP	Dollars Billion	Percent	Dollars Million
<u>FY 1984</u>							
Outlays	848.5	24.3	840.0	24.1	-8.5	-1.0	-8.5
Receipts	659.7	18.9	659.7	18.9	0	0	0
Deficit	-188.8	5.4	-180.3	5.1	-8.5	-4.5	-8.5
<u>FY 1985</u>							
Outlays	918.5	24.1	886.1	23.3	-32.4	-3.5	-40.9
Receipts	724.3	19.0	724.3	19.0	0	0	0
Deficit	-194.2	5.1	-161.8	4.2	-32.4	-16.7	-40.9
<u>FY 1986</u>							
Outlays	989.6	23.9	926.0	22.3	-63.6	-6.4 ^{1/}	-104.5 ^{1/}
Receipts	841.9	20.3	795.9 ^{1/}	19.2	-46.0 ^{1/}	-5.5 ^{1/}	-46.0 ^{1/}
Deficit	-147.7	3.6	-129.3	3.1	-18.4	-12.5	-58.5
<u>FY 1987</u>							
Outlays	1,061.8	23.7	967.7	21.6	-94.1	-8.9 ^{1/}	-198.6 ^{1/}
Receipts	926.1	20.6	876.4 ^{1/}	19.5	-49.7 ^{1/}	0 ^{1/}	-95.7 ^{1/}
Deficit	-135.7	3.0	-91.3	2.0	-44.4	-32.7	-98.2

^{1/} No need for trigger tax increase, so tax receipts are estimated without tax increase.

The freeze on tax rate changes would result in higher tax receipts, 21.4% of GNP, before tax receipts could be allowed to trend downwards towards the average of the last ten years, 19.2%. The elimination of the 1983, 10% across-the-board personal income tax cut would add \$30 to \$40 billion to revenues on an annual basis. The earlier initiation of indexing of personal income tax brackets would lower tax receipts by about \$10 billion annually and take away the incentive for the Federal government to benefit from inflation at the expense of taxpayers.

The double freeze would lower the deficit every year from \$207.7 billion in FY 1983 (\$225 billion for on and off budget) to achieve a balanced budget at high employment by the end of 1986 and a potential \$47 billion surplus during 1987 -- which could be used to generate greater savings, or cut taxes, or increase government spending. If tax cuts are considered, they should be aimed at increasing savings and investment in both human capital (e.g. training and education) and physical capital (e.g. residential, commercial and industrial structures and equipment).

Such a marked improvement in fiscal policy would allow monetary policy to be far less restrictive. Removal of excessively stimulating fiscal policy and excessively stringent monetary policy would:

- lower actual inflation by increasing inflation-reducing investment in people, structures and equipment;
- lower fear of inflation and lower the inflationary pressure on interest rates and long-term economic relationships;
- lower interest rates because more savings are available for investment;

- bring real interest rates down nearer to normal:
 - from 7 to 3% above the inflation rate for home mortgages now to about 4% above the inflation rate (Tables 4 and 5);
 - from 6 to 7% above the inflation rate for Corporate AAA Bonds to about 3% above the inflation rate (Tables 4 and 5);
 - from about 5 to 6% above the inflation rate for Government Bonds to 2 to 3% above the inflation rate.
- bring interest rates down to normal levels found in other industrial countries that have held their deficits down to reduce government's competing demand for private savings (see Table 6).

TABLE 4
REAL INTEREST RATES IN THE UNITED STATES

	Federal Government Deficits <u>1/</u>		Real Long-Term Interest Rates <u>2/</u>	
	Billion Dollars	% of Personal Savings	New Mortgage Rate	Corporate AAA Bonds
1950-1959 Average	1.8	9.7	2.0	1.0
1960-1969 Average	5.8	17.6	3.4	2.7
1970-1979 Average	30.2	38.1	2.2	1.8
1980	59.6	56.1	4.7	3.1
1981	57.4	44.5	7.3	5.6
1982	110.6	78.4	10.6	7.8
1983 (Forecast)	207.7	134.5	9.4	6.3
1984 (Forecast)	188.8	92.7	7.8	5.9

1/ On budget only. Including off budget would increase the President's proposed budget from \$208 to \$225 billion in FY 1983 and 146% of Personal Savings and from \$188.8 to \$202.8 billion in FY 1984 and 100% of Personal Savings.

2/ Real long-term interest rates are defined as mortgage rates or Corporate AAA Bond rates minus the rate of inflation as measured by the annual percent change in the GNP deflator.

SOURCE: NATIONAL ASSOCIATION OF REALTORS®

TABLE 5

BENEFITS OF DOUBLE FREEZE
 COMPARED TO ADMINISTRATION PROPOSAL OF A
 ONE-YEAR SPENDING FREEZE 1984-1987
 (Change in Level)

Source of Lower Interest Rates	1984	1985	1986	1987
Consumer Price Index	-0.1	-0.2	-0.3	-0.4
More Savings for Investment	-0.4	-0.7	-1.1	-1.7
Lower Inflation/Uncertainty Expectation	-0.5	-0.8	-1.0	-1.2
Lower Long-Term Interest Rates	-1.0	-1.7	-2.4	-3.3

TABLE 6

CENTRAL GOVERNMENT DEFICITS IN
 MAJOR INDUSTRIAL COUNTRIES

Country	FY 1982 and (FY 83) Deficit ^{1/}		
	\$US Billions	% of Personal Savings in 1982 ^{2/}	Real Long-Term Interest Rates in Private Sector
United States	110 (207)	78 (134)	8-10 (6-9)
United Kingdom	15.6	62.5	5
West Germany	23.2	37.8	3.0
France	11.6	19.0	3.0
Japan	31.8	18.3	2 to 3

^{1/} Federal deficit for U.S. (on and off budget), general government current account deficits for calendar 1982 for all other countries. Figures in parenthesis is the U.S. President's estimates for FY 1983.

^{2/} 1982 personal savings figures for all countries other than the U.S. supplied by Wharton Econometric Forecasting Associates.

- bolster the current recovery so that growth of output, income and jobs does not languish at one-half the pace of past

BRIEFING PAPERS ON OTHER LEGISLATIVE AND ADMINISTRATIVE ISSUES

January 26-31, 1983

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NOTE: At the time these Briefing Papers were prepared, the President's State of the Union Address had not been delivered and Congressional action had not begun for the 98th Session. However, these papers are intended to provide an overview of some major legislative and administrative issues of concern to REALTORS® for 1983.

FEDERAL BUDGET CONSTITUTIONAL AMENDMENTBACKGROUND

The main issue for Congress for the last two years has been the Federal Budget, specifically the rapidly increasing deficits (from \$73.9 billion in fiscal 1980, to a possible \$200 billion in fiscal 1983). The national debt rose from \$300 billion in 1960 to over \$1.2 trillion today. This explosive growth of deficit spending has placed severe demands on capital markets and curtailed needed investment funds for the private sector. Legislative initiatives to bring future deficits to a decline have passed Congress but still have not assured deficits under \$100 billion will be achieved through 1985.

The need for a Constitutional restriction on deficit spending will be even more crucial as it becomes clear that deficit will increase in future years to well over \$200 billion unless fiscal restraint is imposed upon Congress and the Administration.

STATUSSenate

In 1982 the full Senate approved S.J. Res. 58, which proposed a Constitutional Amendment to balance the Budget unless three-fifths of both Houses voted to allow a deficit. The projected rate of increase of revenues for any fiscal year would be limited to the rate of increase in national income for a recent period plus any tax increase passed by both Houses by a majority of the members and signed by the President. The Senate bill also included a provision offered by Senator William Armstrong (R-CO) which prohibited exceeding the national debt ceiling unless three-fifths of both the House and Senate approve and the President signs a bill permitting such an increase. Senator Robert Dole (R-KS) offered but did not bring to a vote a REALTOR-supported amendment which would have changed the voting requirement for raising taxes from a majority of the members of each House to three-fifths of the members of each House to make it identical to the voting requirement for approving deficits and additional debt.

House

Two days before the recess for elections, a bipartisan coalition in the House, with the aid of Vice President Bush, succeeded in gaining the necessary 218 member signatures on a discharge petition which removes the issue from the Committee's jurisdiction and sends it directly to the House floor. The Democratic leadership then rushed the issue to the floor for a vote in the last hours of the session, giving little opportunity for grass-roots efforts to be applied. The vote of 236 to 187 fell 46 votes short of the necessary two-thirds majority to pass the resolution for an amendment to the Constitution.

FEDERAL BUDGET CONSTITUTIONAL AMENDMENT - cont.OUTLOOK

While the Senate might quickly pass the Constitutional Amendment resolution it approved last Congress, the House, with 46 new Democrats, is expected to reject the measure by an even greater number than last year if it can be brought to the floor at all. (At one point the House Democratic Caucus proposed a change in House Rules which would have required two-thirds of the members to sign a discharge petition rather than the majority now required, but that proposal was dropped.)

Thirty-one of the required 34 states have thus far called for a Constitutional Convention; perhaps the Congressional deadlock will only break when the state convention movement threatens to hit 34.

REALTOR® POSITION

The National Association believes that, although the Constitutional Amendment offers no immediate solution to the current economic situation, the Amendment would be of benefit to make Congress and the President plan balanced budgets for future years. Therefore, we support a Congressional initiative and the states' ratification of a Constitutional Amendment and/or law which will make Congress accountable for excessive spending. The Constitutional Amendment should require a three-fifths vote for raising taxes, as well as for approving a deficit budget or adding to the national debt, in order to create a bias in favor of spending restraint rather than tax increase to balance the budget.

1/14/83

PROSPECTIVE TAX LEGISLATIONBACKGROUND

Despite the enactment of the Tax Equity and Fiscal Responsibility Act of 1982, future budget deficit projections, assuming current law, exceed \$150 billion. Further, these deficit projections do not envision a significant downward trend. The high level of government borrowing needed to finance such deficits assures a continuing tight credit market and a troubled economy. This situation is likely to inspire Congressional and Administrative efforts to reduce federal spending and increase federal tax revenues. Assuming continued Congressional resistance to meaningful spending reductions, it is likely that selected revenue increases will be enacted.

Although such legislation has not yet been introduced in the 98th Congress, possible tax increases which would adversely affect the real estate industry include:

- limitation of the home mortgage interest deduction. This proposal was floated by Treasury Secretary Donald Regan as a revenue-raising option and recently has been somewhat withdrawn. In the past such proposals have led to attempts not to limit but to eliminate all home mortgage interest deductibility. A leading critic of home mortgage interest deductibility in the past has been the Congressional Budget Office.
- lengthening the real property depreciation recovery period from 15 years to 20 years. Lengthening the depreciation recovery period was suggested during last year's discussions on tax increase options but was not included in the Tax Equity and Fiscal Responsibility Act of 1982 because successful arguments were made explaining that a 15 year recovery period and the acceleration methods provided under the accelerated cost recovery system are not unreasonable when compared to the benefits given other assets.
- industrial development bond restrictions to require pre-1981 Economic Recovery Tax Act depreciation periods for IDB-financed property, state government contributions equal to a percentage of the cost of each IDB-financed project and the inclusion of interest earned on IDBs in the individual minimum tax preference pool. Pre-ERTA depreciation periods are 35 years on non-residential buildings. Past opposition to IDBs has developed because of fundamental opposition to tax-exempt finance for private business--despite any economic scenarios.

STATUS/OUTLOOK

At this writing tax increase legislation has not been introduced in the new Congress. The tax debate will likely come to the forefront in early February following the President's State of the Union Address and submission of the Administration's FY 1984 budget proposals.

1/14/83

PROSPECTIVE TAX LEGISLATION - cont.

Treasury Secretary Regan said January 12, 1983 that, while minor revenue increase probably would be sought during fiscal year 1983, the Administration was not planning any "major" tax hikes until fiscal 1984 and beyond.

It is too early to anticipate correctly whether any proposals to limit home mortgage interest deductibility will receive significant Congressional consideration. Members of the Administration and some legislators indicate however that they will be considering all revenue possibilities.

Conversely, there will almost certainly be legislative efforts to lengthen the real property depreciation recovery period and institute greater IDB limitations.

The most likely vehicle for tax increase proposals would be as an amendment to the Social Security legislation which must be approved by Congress prior to July 1, 1983. The concern over increased industrial development bond limitations might also come up in the context of the debate on the sunset provision for single-family mortgage revenue bonds (see mortgage revenue bond briefing paper).

REALTOR® POSITION

The NATIONAL ASSOCIATION OF REALTORS® does not support any tax increases which would place new tax burdens on the housing taxpayer. The housing industry is the only industry now showing real signs of economic recovery. For housing to continue to lead the economy out of recession, housing- and real estate industry-related tax incentives, including the existing home mortgage interest deductibility, real property depreciation recovery period and availability of industrial development bonds, must remain unchanged.

1/14/83

FLAT RATE TAX SYSTEMBACKGROUND

The United States tax system, as the result of economic, social and political influences, has become increasingly complex and is permeated by deductions, credits, exclusions and sundry exceptions to even the most general rule. As a result, a number of individuals, including lawmakers from both major political parties and tax analysts from liberal and conservative organizations, contend that this system should be phased out and replaced by a single marginal tax rate for all taxpayers in all income tax brackets.

Most flat rate proposals would apply a single rate ranging from 10% to 20% to some form of "taxable income," but there is little consensus among these proposals on what is meant by taxable income. Some definitions involve taxing some types of income that are exempt under the current system--for example, Social Security payments. Other definitions of taxable income would eliminate some or all of the itemized deductions, exclusions and credits that are allowed under the current progressive system. Many of the current deductions and exclusions promote socially acceptable and desirable goals. For example, the deductibility of mortgage interest payments makes homeownership more affordable, and excluding charitable contributions from taxable income encourages support for churches and non-profit organizations.

STATUS/OUTLOOK

Although a number of flat rate tax proposals were introduced in the 97th Congress, no such proposal received serious committee consideration.

Although the Treasury Department indicated last September that it would not be prepared to offer any specific flat rate proposal until late 1983, at this writing the President seems certain to propose a major overhaul of the Federal income tax system that would include many aspects of what is referred to as the flat rate tax system. The proposal, as now contemplated, would both promote savings and capital investments plus increase the general revenue through elimination of unwarranted tax loopholes. The proposal also would not be for immediate action, but rather would concern itself with possible changes to occur in 1985 and beyond. Although such a proposal may be forthcoming, Congressional support would become tenuous as the increased tax burden on lower and middleclass taxpayers becomes more apparent. Further, the prospect of eliminating popular and widely-used deductions such as home mortgage interest and charitable contributions, increases flat rate tax system opposition.

REALTOR® POSITION

The NATIONAL ASSOCIATION OF REALTORS® supports tax reform measures to reduce inequality in the distribution of income, as long as revision of the existing tax structure does not eliminate or significantly reduce incentives for private savings. Proposals accentuating an anti-savings bias could not be supported.

1/14/83

REAL ESTATE DEPRECIATIONBACKGROUND

The Economic Recovery Tax Act of 1981 replaced the prior law depreciation system with the Accelerated Cost Recovery System (ACRS). ACRS is a system for recovering capital costs using accelerated methods over predetermined recovery periods that are generally unrelated to, but shorter than, prior law useful lives. The ACRS methods of cost recovery and recovery periods are the same for both new and used property, and ACRS is mandatory for all eligible property.

Under the new system, the cost of eligible personal property must be recovered over a 15-year, 10-year, 5-year, or 3-year period, depending on the type of property. Most eligible personal property is in the 5-year class. Cars, light-duty trucks, research and experimentation equipment, and certain other short-lived property are in the 3-year class. The 10-year class includes certain long-lived utility property, railroad tank cars, coal-utilization property, and certain real property described in section 1250(c).

Real property has a 15-year recovery period. As an option to the 15-year recovery period, taxpayers may elect either a 35-year or 45-year extended recovery period. The election may be made on a property-by-property basis.

Recovery of costs generally is determined by using a statutory accelerated method. As an option, the taxpayer may choose to recover costs using the straight-line method over either the regular recovery period or one of the longer recovery periods provided.

The entire cost or other basis of eligible property is recovered under the new system, eliminating the salvage value limitation of prior law.

The taxpayer has an option to use (1) prescribed percentages based on an accelerated method over the regular 15-year recovery period or (2) the straight-line method over either the regular 15-year period or the optional longer recovery period chosen. The election of recovery methods may be made on a property-by-property basis.

STATUS/OUTLOOK

During the consideration of the Tax Equity and Fiscal Responsibility Act of 1982, several proposals were made to limit ACRS writeoffs for real property: the Ways and Means Committee Revenue Bill Summary proposed that the recovery period for used structures should be extended from 15 to 20 years.

Fortunately, as the result of a vigorous effort by the real estate and retail industries, no changes were made in the depreciation provisions applying to real estate because of arguments indicating that prior law favored investment in equipment assets over structures and that under ACRS this trend is continued and strengthened.

REAL ESTATE DEPRECIATION - cont.REALTOR® POSITION

The NATIONAL ASSOCIATION OF REALTORS® supports the continued 15-year real property depreciation recovery period. An extension of the recovery period would place investment in industrial, commercial and residential building at a further disadvantage just as the real estate industry is showing signs of recovery.

1/14/83

MORTGAGE REVENUE BONDSBACKGROUND

Mortgage revenue bonds are bonds issued by state and local subdivisions whereby the proceeds of the issue are used for mortgages, or other financing, of owner-occupied residences. Interest on qualified mortgage bonds is tax-exempt and therefore provides a housing investment incentive. The Tax Equity and Fiscal Responsibility Act of 1982 continued certain strict requirements which must be met for the bond interest to be tax-exempt. The Act also provided changes to encourage additional mortgage revenue bond issues. These changes included increasing the allowable arbitrage, purchase price and first-time homebuyer limitations.

Authority to issue tax-exempt single-family mortgage revenue bonds is scheduled to expire, or sunset, at the end of 1983. To ensure the continued availability of tax-exempt single-family mortgage revenue bonds there will likely be a legislative effort to eliminate or extend this scheduled 1983 sunset date.

STATUS

Legislation designed to eliminate the single-family mortgage revenue bond sunset date will be introduced in the House and Senate at the end of January 1983. Primary sponsors are Senators Roth, Mitchell and Representatives Downey and Frenzel. Each expects significant numbers of co-sponsors on this legislation to be entitled, "The Housing Finance Opportunity Act of 1983."

OUTLOOK

Because interest rates have decreased somewhat the need for continuing the mortgage revenue bond program has become less apparent. Hearings on the Housing Finance Opportunity Act will likely not occur until early summer, after settlement of the Social Security issue.

REALTOR® POSITION

The NATIONAL ASSOCIATION OF REALTORS® supports legislation which would authorize the continued availability of mortgage revenue bonds as a device to provide low-cost single-family home financing during times of rising interest rates.

1/14/83

MORTGAGE FINANCE: MAKING IT WORK FOR THE EIGHTIESBACKGROUND

Since the 1930's the housing finance needs of the country have been ably met by the nation's thrift institutions which made long-term mortgage loans from relatively cheap, regulated savings accounts held by that institution. Now, of course, these institutions must change the way they do business as money market funds, secondary markets, and other new forces grow in the marketplace. Mortgage dollars will have to compete in this new, increasingly deregulated financial environment with all other types of capital.

This country's housing credit needs will be substantial for the rest of the decade, over 1.5 trillion dollars. In order to meet this need, the way mortgages have been traditionally financed will also have to change. More and more mortgages will be sold by the lender that originated the loan to investors in the secondary market. While approximately 30% of all loans originated by lenders were sold in 1982, by the end of the decade over 80% of all mortgages will be financed by sales to investors in the secondary market.

Perhaps the single most important factor in the ability of secondary markets to meet this country's housing needs is the development of new financial instruments that can compete with corporate securities, stocks, and other investments in the nation's capital markets. These instruments are conventional (i.e. private, without federal insurance or support) mortgage-backed securities.

Mortgage-backed securities enables investors unfamiliar with the business of mortgage lending to invest in familiar securities that, in fact, derive their income from the monthly payments of large "pools" of mortgages.

Presently, most FHA and VA mortgages are funded by the sale of Government National Mortgage Association guaranteed mortgage-backed securities, but, conventional mortgage-backed securities are only in their early stages.

Pension Fund Investment in Housing

Since pension funds have tremendous equity and the ability to invest long-term, they are an excellent source of funds for housing and are suited to housing investment through mortgage-backed securities. Private pension funds alone hold assets over \$500 billion; but until recently, have been restricted from investing in residential mortgage instruments by regulations contained in the Employee Retirement Income Security Act of 1974 (ERISA).

Last year, the Department of Labor issued regulations allowing private pensions funds to invest in government-backed securities. The NATIONAL ASSOCIATION OF REALTORS® urged the Labor Department to expand the regulations to allow conventional mortgage-backed security investment by private pension funds. On January 7, the Labor Department issued a regulation which, in effect, removes ERISA restrictions to mortgage-backed security investment by private pensions funds.

1/14/83

MORTGAGE FINANCE: MAKING IT WORK FOR THE EIGHTIES (cont'd)STATUSAdministration

The President's Commission on Housing urged that regulatory and legislative impediments to the competitiveness of private mortgage-backed securities be removed. These include regulations of the Securities Exchange Commission (SEC), the Federal Reserve Board, the Internal Revenue Service, the Department of Labor and the Department of the Treasury. The SEC, the Fed, and the Department of Labor have made much progress in implementing some of the Commission's recommendations with the support of the NATIONAL ASSOCIATION OF REALTORS®.

Trust Investment Mortgage Securities (TIMS)

White House staff has worked hard to encourage action on the recommendations of the President's Commission on Housing. The staff has circulated a proposal, known as the Trust Investment Mortgage Securities (TIMS) which, although not yet finalized, embodies the spirit of the Commission's recommendations.

OUTLOOK

It is likely the TIMS proposal will emerge in the near future as a specific proposal. The scope of the legislation will have great bearing on its chances of passage in the 98th Congress.

A tax ruling will be requested in the near future that could quickly open the door to a variety of new, highly attractive mortgage-backed securities. This would allow several securities of varying length (2 year, 5 year, etc.) to be tied to the same pool of mortgages. The impact of such a ruling would be swift and dramatic as a means of making mortgage-backed securities very competitive, attractive investment vehicles.

REALTOR POSITION

The NATIONAL ASSOCIATION OF REALTORS® supports legislative and regulatory efforts to enable mortgage-backed securities to compete more effectively in the capital markets.

The Association has supported the following actions recently taken:

- The January 7, 1983 ERISA regulation which will remove remaining restrictions on private pension plan investment in all mortgage-backed securities;
- The January notice by the Securities and Exchange Commission that it will allow streamlined registration for issuances of private mortgage-backed securities;
- The January 15 implementation of the Federal Reserve Board's change to Regulation T to allow the use of private mortgage-backed securities as collateral for margin credit of securities firms.

1/14/83

MORTGAGE FINANCE: MAKING IT WORK FOR THE EIGHTIES (cont'd)REALTOR® POSITION (cont'd)

The National Association also supports the following necessary actions:

- amend the Internal Revenue Code or seek appropriate regulatory changes to provide relief for conventional mortgage-backed securities from taxation at the pool/issuer level, provided the conventional mortgage-backed securities meet minimum criteria;
- further amend the Internal Revenue Code to treat the recovery of discounts on CMBS on the same basis as discounts on corporation securities; and
- allow CMBS issues to register as regulated investment companies.

1/14/83

REAL ESTATE BROKERAGE BY FEDERALLY-INSURED DEPOSITORY INSTITUTIONSBACKGROUND

On February 25, 1982, the Federal Home Loan Bank Board (FHLBB) proposed to expand the authority of federally chartered savings and loan associations through their service corporations to enter into "third-party" real estate brokerage activities on a pre-approved basis.

On October of 1981, Secretary Regan proposed legislation that would allow bank holding company subsidiaries to acquire real estate brokerage firms and generally engage in a broad range of activities currently restricted by regulation and legislation. This "affiliate" proposal will emerge in the 98th Congress and Secretary Regan has indicated that he would like to see it as one of the first items on the legislative calendar.

On November 3, 1982, the Bank Board withdrew the proposed regulation, responding to strong congressional opposition expressed in the Garn-St Germain Depository Institutions Act of 1982, signed by the President on October 15, 1982.

The original version of the Garn bill provided an expansion of asset authority for the service corporations of federally chartered S&Ls from 3% to 5%. The final bill deleted this provision entirely and the report accompanying the bill, as passed, contained a congressional directive to the Federal Home Loan Bank Board to limit its list of "pre-approved activities" of service corporations to those promulgated on April 12, 1981.

Treasury Secretary Regan proposed legislation that would allow bank holding company "affiliates" to engage in securities activity and would also allow bank holding company subsidiaries to become involved in a large number of activities, including unrestricted real estate brokerage. The Regan "Bank Holding Company Deregulation Act of 1982" failed to move in the 97th Congress but will emerge in the 98th Congress as one of the first items on the legislative calendar per Regan's request.

The traditional regulator of bank holding company subsidiaries, the Federal Reserve Board, has consistently refused to allow bank holding company subsidiaries to enter real estate brokerage. This legislation would take the control of these activities from the Federal Reserve Board to the Treasury Department.

Specifically, permitting financial institutions to become involved in real estate brokerage would:

- Create great potential for abuse because the distinctions between lenders and users of credit would be blurred. Financial institutions generally have been prohibited from carrying on any business other than banking. This prohibition is based on the belief that the safety and soundness of all financial institutions must be carefully guarded for the protection of depositors. The principal means of accomplishing this has been to limit risky non-bank activities in which financial institutions could engage; and

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REAL ESTATE BROKERAGE BY FEDERALLY-INSURED DEPOSITORY INSTITUTIONS (cont'd)BACKGROUND (cont'd)

- Permit unfair competition. The parent savings and loan or bank holding company provides the service corporation or subsidiary with a built-in, readily available source of funds, while access to such credit could be eliminated for small businessmen. The service corporation or subsidiary could also obtain more favorable service charges, interest rates and home buyer loan approvals than other savings and loan or commercial bank customers could.

STATUSAdministration

Secretary Regan, reflecting the "free market" views of the Administration has given this proposal top priority.

Senate

Regan's proposal was introduced, by request, by Senator Garn during the 97th Congress. Hearings were held as part of the overall Garn bill hearings. No action has been scheduled for the 98th Congress; although the Senate Banking Committee is committed to considering the restructuring of the financial services industry, a study that would include whether or not there should be a separation between banking and commerce.

House

No action scheduled.

OUTLOOK

It is likely that both the House and the Senate will respond to Secretary Regan's request, at the least, by holding hearings. The House Banking Committee has indicated that its emphasis will be on the international and domestic lending crises.

REALTOR® POSITION

The NATIONAL ASSOCIATION OF REALTORS® opposes any further attempts to expand the involvement of federally protected financial institutions into non-banking activities such as real estate brokerage.

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FEDERAL REAL PROPERTY DISPOSALBACKGROUND

The federal government is the largest real property owner in the United States, holding one-third of the nation's entire land area. Included in the federal estate are approximately 25,000 installations and 405,000 buildings with 2.65 million square feet of floor area. This estate has no assessed market value and an adequate inventory has not been kept to identify which real property assets are no longer needed by the federal government.

To remedy this situation, the Reagan Administration has undertaken a comprehensive new program to inventory and identify unneeded federal properties and to facilitate the sale of those properties to the private sector. Sales proceeds could be used to help reduce the national debt. However, present law requires that these proceeds be directed into the Land and Water Conservation Fund which is used to buy more property.

The Administration's enterprising, large-scale property disposal program promises numerous benefits to both government and private interests, including:

- Proceeds from the federal property could be used to help reduce the national debt;
- Private property ownership opportunities will be increased;
- Government cost of managing excess property will be reduced;
- Townsite expansion will be possible in areas where federal lands border town limits and restrict growth;
- Local tax bases will increase as unused and underutilized property is conveyed to private ownership;
- Economic development will be encouraged as property is put to its highest and best use and thus federal tax revenues will increase.

The General Services Administration (GSA) currently administers the largest federal property disposal program. In FY 1980 approximately \$1.7 billion worth of property was designated excess or surplus; however, only \$83 million was actually sold. (It should be noted that GSA property figures are listed as acquisition cost, not market value and thus do not reflect market prices.)

The Office of Management and Budget has estimated that under the Administration's new property program, \$1 billion in GSA property can be sold in FY 1983, and \$4 billion can be sold each year over the next five years.

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FEDERAL REAL PROPERTY DISPOSAL (continued)

The NATIONAL ASSOCIATION OF REALTORS® has implemented the AID (Assist in Inventory and Disposal) program to assist the federal government in identifying and marketing excess federal property. This program is headed by a task force whose members represent every facet of the real estate profession. The task force is working closely with Congress and the Administration to expedite the property disposal process.

STATUSHouse and Senate

Legislation to enable the receipts from surplus property sales to be used to help reduce the national debt was introduced late in the 97th Congress. That legislation, known as the National Debt Retirement Act, will be reintroduced in the 98th Congress. Hearings on this legislation can be expected early in the session on the Senate side. House hearings can also be expected on the general issue of federal property disposal and the steps the Administration is taking to further the disposal process.

Administration

Last year, the Reagan Administration established a Property Review Board to oversee and expedite the federal property disposal program. The Property Review Board has been working with various federal agencies and other groups to identify unused and underutilized property and to iron out any problems in the disposal process. The Board plans to meet on January 18th with several REALTORS® from the Farm and Land Institute to discuss existing problems in selling unimproved federal lands. Subsequent meetings with other REALTOR® groups will be scheduled with the Property Review Board.

Meanwhile, the Department of the Interior has established an Asset Management Office which is preparing recommendations on how the Bureau of Land Management can more expeditiously dispose of its unneeded property. Also, the Department of Agriculture is in the process of drafting legislation to expand its current land sale authority -- specifically its authority to sell unneeded lands controlled by the Forest Service.

As part of the Administration's disposal efforts, lists of surplus federal properties being made available for sale are now being published by the General Services Administration on a monthly basis. REALTORS® can be placed on a mailing list to receive free monthly copies of the "U.S. Real Property Sales List" by writing to the Consumer Information Center, Department 587L, Pueblo, Colorado 81009.

OUTLOOK

This large-scale property disposal program is unprecedented in scope. Because it is an ambitious concept, the program caused some controversy on Capitol Hill in the last Congress. However, the National Debt Retirement

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FEDERAL REAL PROPERTY DISPOSAL (continued)

Act will be reintroduced in the 98th Congress and may receive active consideration. Furthermore, the Reagan Administration will seek legislation to expand its current land sale authority as in the case of lands controlled by the Forest Service.

REALTOR® POSITION

The National Association early on urged a more enterprising federal real property disposal program to assist in reducing/restraining the federal debt and to increase private property ownership opportunities. The Association will support legislation to further this effort and to enable the receipts from surplus property sales to be used to help reduce the national debt.

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COASTAL BARRIER PROTECTIONBACKGROUND

The Coastal Barrier Resources Act (CBRA) was passed by both Houses of Congress last September and was signed into law by the President on October 18th. The Act intends to slow further development in coastal areas by withdrawing virtually all federal programs in "undeveloped" areas.

This Act establishes a coastal barrier resource system made up of specific islands, other coastal barrier structures and portions thereof along the east and gulf coasts that are currently "undeveloped." Development will be restricted through the denial of federal flood insurance and all other government programs such as VA, FHA, and small business loans. Highway and sewage treatment funds will also be terminated.

Congress adopted maps of undeveloped coastal barriers based on maps proposed by the Department of Interior. Coastal REALTORS® were successful in encouraging their Representatives and Senators to remove approximately 125 miles of beachfront from the originally proposed Interior Department maps. The Act authorizes the Interior Department to recommend minor and technical boundary changes to these maps.

STATUS

While all other federal programs were terminated in undeveloped areas upon enactment of the Coastal Barrier Resources Act, federal flood insurance will remain available until October 1, 1983.

The National Association has received copies of the final coastal barrier maps adopted by Congress and has sent them to the 59 local boards in the coastal areas affected by the legislation so that they may have the opportunity to comment on minor and technical boundary modifications. The boards have been asked to submit any comments to their Governors, State Coastal Zone Management Agencies and the Department of the Interior by February 1st. Additional comment opportunities will be provided as specific map alternations are proposed.

OUTLOOK

Beyond the immediate provisions of this legislation, the Coastal Barrier Resources Act has raised questions concerning the federal flood insurance program in general. This act denies flood insurance coverage for certain areas of the United States yet retains coverage for other flood-prone areas. The National Association will review the flood insurance program to ascertain its effectiveness in mitigating flood hazards and reducing federal outlays for flood losses.

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COASTAL BARRIER PROTECTION (cont'd.)

REALTOR® POSITION

During consideration of the Coastal Barrier Resources Act, the Association was forced to seek adoption of the Congressional maps more responsive to our concerns. Passage of the Act reduced the number of property owners affected by this legislation. In addition, the Association believes the federal government should adopt a coherent and uniform policy for administering the flood insurance program, thereby eliminating the existing double standard which denies insurance coverage for certain flood-prone areas, such as coastal barriers, yet retains coverage for the remainder of the United States subject to flooding. Administrative and legislative actions to alter the federal flood insurance programs must ensure that property rights and reasonable development opportunities are not abridged.

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CLEAN WATER ACT - "DREDGE AND FILL"BACKGROUND

The Clean Water Act will be considered for reauthorization during the 98th Congress. The Act actually expired in 1982 but its programs remain in effect. Congress considered amendments to the act last year but did not take action on the dredge and fill permit program, Section 404 of the Clean Water Act. This program requires the U.S. Army Corps of Engineers, the Environmental Protection Agency, and the U.S. Fish and Wildlife Service to issue permits for any development activity, including farming and construction, in wetland areas. Congress originally intended the dredge and fill permit program to affect only navigable waters but a 1975 court ruling extended the jurisdiction of the program to virtually all waters of the United States and their adjacent wetlands.

The current dredge and fill program produces costly and time-consuming delays for permit applicants because the scope of the program is too broad and the permit regulations are too ambiguous. Permit applications have soared from 2,900 requests in 1974 to 9,200 in 1976 and 35,000 in FY 1981. Of this total, only half actually required a permit. Approximately 30% of the permits require processing time of 250 days to 3 years while the remaining 70% are processed within 70 days. The current average permitting time is 120 to 300 days.

The Reagan Administration has taken steps to reduce the regulatory burden this program presents by streamlining the permit application process and reducing the overlapping responsibilities of the three federal agencies which administer the dredge and fill program. However, legislation is needed to reduce the scope of this program to truly navigable waters and allow greater state and local control in issuing permits.

STATUSHouse and Senate

Both the Senate Environment and Public Works Committee and the House Public Works and Transportation Committee have established the reauthorization of the Clean Water Act as a top priority for the 98th Congress. The Senate Committee plans early hearings on Clean Water Act amendments and reauthorization and hopes to have a bill approved by March 15th and on the Senate floor by April 1st. The House Committee has not yet set a schedule, but may seek to approve a simple reauthorization by May 15th and deal with the substantive issues later.

Administration

The Environmental Protection Agency (EPA) plans to develop a new set of clean water amendments to submit to the 98th Congress which may include statutory changes in the Section 404, dredge and fill program. EPA, however, is currently in the process of drafting new regulatory guidelines for per-

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CLEAN WATER ACT - "DREDGE AND FILL" (continued)

mitting under the Section 404 Program. Furthermore, the Army Corps of Engineers is preparing additional revisions to the Section 404 regulations which it issued last July.

OUTLOOK

Given the controversy and delays experienced in reauthorizing the Clean Air Act and the fact that no consensus has yet been reached among Congress, the Administration, industry and environmentalists on the major clean water issues, amending the Clean Water Act will probably prove to be a long and laborious process.

REALTOR® POSITION

The NATIONAL ASSOCIATION OF REALTORS® feels past experience indicates the need to establish a more balanced approach between conservation and development. The dredge and fill program of the Clean Water Act fails to meet this balance, and the Association supports amendments to address economic realities while retaining the integrity of the environment. Specifically, the Association supports amendments to redefine "navigable waters" as only those waters essential for conducting commerce and further remove the redundant regulatory process currently mandated by the Act.

1/14/83

CLEAN AIR ACTBACKGROUND

The Clean Air Act, as passed in 1970 and substantially amended in 1977, contains a number of issues important to the real estate/development industry. The direct and indirect effects of the Act are having a significant impact on the timing, location, and type of real estate development throughout the nation. The Act, which requires reauthorization, remains vital to the real estate/development industry.

The original Clean Air Act of 1970 established air quality standards to protect public health and welfare. To meet these standards the act mandated that auto pollution be reduced, emissions from major stationary sources of air pollution be controlled, and that State Implementation Plans (SIP's) outlining how air quality standards would be achieved and maintained be developed. The 1977 Clean Air Act amendments included several provisions of particular interest to the Association, specifically a prevention of significant deterioration (PSD) policy and non-attainment policy for "dirty air" areas. These provisions are among the Act's most controversial. Some areas have air cleaner than air quality standards and the PSD policy was implemented to prevent air quality deterioration in those areas. Non-attainment policy mandates sanctions such as construction moratoriums and withholding highway funds and wastewater treatment grants for areas not meeting national air quality standards.

Congress has debated amendments to the Clean Air Act for the past two years with limited progress. The Senate Environment and Natural Resources Committee completed work on a comprehensive clean air bill which won the support of environmental and some labor groups. The House Energy and Commerce Committee considered a business and industry supported bill which never emerged from the committee.

The House clean air bill contained the following provisions of particular import to the Association:

- The Prevention of Significant Deterioration (PSD) program would be trimmed to include only parks and wilderness areas while other "clean air" areas would become accessible to new development with less restriction than under current law. Lowest priority "clean air" areas (Class III) would be dropped from the PSD program. Class II areas, which are usually around parks and wilderness areas, would remain in the program unless states opt out within 18 months.
- Compliance deadlines in non-attainment ("dirty air") areas would be extended to 1987, allowing metropolitan areas with severe pollution problems additional time to attain clean air standards.
- Sanctions would be minimized to ease the construction ban and eliminate withholding federal funds for sewage treatment facilities and highway construction in non-attainment areas.

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CLEAN AIR ACT (continued)STATUSHouse and Senate

Neither the House Energy and Commerce Committee nor the Senate Environment Committee have determined their agenda for amending the Clean Air Act in the new Congress. However, both committees anticipate action early in the session.

Administration

The Environmental Protection Agency (EPA) is mandated to impose sanctions on areas which fail to meet national air quality standards. By January 31, EPA will publish a list of approximately 145 counties that have failed to meet air quality attainment deadlines. These counties will be subject to a construction ban on new sources of pollution and funding cutoffs for federal highway and transportation funds. Air pollution control grants to state and local governments will also be terminated in non-attainment areas. However, EPA does not expect to withhold sewage treatment funds although it is authorized to do so.

OUTLOOK

The outlook for amending and reauthorizing the Clean Air Act is uncertain. The composition of the House and Senate committees has changed since the election so it is difficult to predict how this legislation will be considered. The Reagan Administration is expected to continue to push for comprehensive changes in the Act, using the sanctions as leverage to spur Congressional action.

REALTOR® POSITION

The Association favors the restoration of a true balance in our environmental laws between economic viability and productivity on one hand and pollution control on the other. This balance is not generally reflected in the Clean Air Act as presently constituted.

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LAND SURVEY LEGISLATIONBACKGROUND

As federal landholdings are resurveyed, discrepancies in boundary designations have been identified. Past surveys have proved sometimes inaccurate, and property disputes between private owners and government agencies have resulted. The U.S. Forest Service is involved in an estimated 60,000 cases of such boundary disputes.

Representative Ronald Marlenee (R-MT) and Senator Pete Domenici (R-NM) introduced the Small Tracts Act to authorize the U.S. Forest Service to negotiate land sales or exchanges with private property owners who innocently trespass on government property because of faulty land surveys. Prior to this legislation, aggrieved property owners' only recourse was to seek a private relief bill in Congress to settle a boundary dispute. The Small Tracts Act, P.L. 97-465, allows the Forest Service to negotiate directly with a property owner on disputes of 10 acres or less. The National Association sent letters endorsing this legislation to the House and Senate Agriculture Committees during the legislation's consideration last year.

STATUS

The Small Tracts Act was passed in the closing days of the 97th Congress and was signed by the President on January 12.

REALTOR® POSITION

The NATIONAL ASSOCIATION OF REALTORS® supported this legislation because it remedies boundary disputes which are clouding property titles of aggrieved landowners. This legislation allows the most expeditious means of protecting private property rights in these areas and provides means of avoiding these problems in the future.

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REVISIONS TO RESPABACKGROUND

Toward the close of the 97th Congress, there was an attempt in the House to declare that certain "controlled business" relationships in real estate settlement transactions are violations of the Real Estate Settlement Procedures Act of 1974 (RESPA). Earlier, HUD had withdrawn its interpretative rule in which it attempted to define certain fee referrals in a "controlled business" arrangement as a form of kickback prohibited by RESPA and the Senate had not considered "controlled business" to be an issue. However, House legislation addressed the matter in its "House Housing Authorization Bill."

The legislation sought to clarify Section 8 of RESPA by permitting real estate professionals to refer settlement business to related entities, only if some stated conditions were met. Specifically, referrals to a controlled business would be permitted if the referrer:

- disclosed his interest in the controlled business at the time of the referral,
- did not impose unreasonable restrictions on the buyer's or seller's selection of the settlement provider, and
- received only the return of his or her ownership interest as a result.

The bill prohibited the receipt of kickbacks, referral fees or any other item of value for the referral.

Once the above three conditions are met, additional limitations are imposed whenever a controlled business relationship is involved. Whenever a title company, private mortgage insurance company or escrow service is affiliated with the referrer, at least 80% of the business of the real estate service provider must be received from sources other than the affiliated referrer's. However, this 20% limitation would not apply to transactions involving real estate located in a county that has a population of 25,000 or less.

Finally, the bill eliminated the current RESPA provisions which impose criminal sanctions against persons violating Section 8. However, the bill allowed recovery of treble damages on civil suits for violations of the Act.

STATUS AND OUTLOOK

The issue of whether referrals to a controlled business entity constitutes a form of kickback under RESPA has remained unclear since HUD withdrew its 1980 interpretative ruling. Attempts to declare "controlled business" relationships in real estate settlement transactions as violations of RESPA have failed due to their own lack of soundness or lack of support.

Although there is presently no legislative proposal which would declare controlled business arrangements as violations of RESPA, there will be mounting pressure on the 98th Congress to clarify Section 8 of RESPA. The National Association of Insurance Commissioners has drafted a model "controlled business" law similar to the one which previously surfaced in the House. This may provide impetus for a movement in the 98th Congress to adopt a similar federal law.

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REVISIONS TO RESPA (continued)

REALTOR® POSITION

With respect to the "controlled business" issue, the NATIONAL ASSOCIATION OF REALTORS® states its position that such relationships do not constitute a violation of RESPA. Moreover, REALTORS® do not believe that RESPA has effectively promoted the purposes for which it was enacted. The lack of significant consumer interest in RESPA and absence of alleged violations of that Act's provisions raise the question of that statute's usefulness. We, therefore, will continue to recommend total repeal of RESPA.

1/14/83

BANKRUPTCY REFORMBACKGROUND

Congress passed sweeping bankruptcy reforms in 1978 which were designed to provide for more uniform treatment of creditors and allow for easier and more efficient liquidation or reorganization by debtors. The Bankruptcy Reform Act of 1978 along with the severe recession has led to a dramatic increase in the number of bankruptcies filed. Although the 1978 reforms substantially improved bankruptcy law, the relationship of bankruptcy and real estate transactions was altered in two ways which are of concern to REALTORS®: shopping center leases and property foreclosures.

I. Shopping Center Leases

The bankruptcy of a shopping center tenant can severely harm and even threaten the existence of the neighboring tenants, as well as the entire shopping center in the case of a bankrupt anchor tenant. Traditionally the landlord had a strong measure of control over the leased space of a bankrupt tenant. However, in the Bankruptcy Reform Act of 1978, Congress loosened that control and permitted bankrupt lessees to assume or assign unexpired leases. Although Congress sought to protect landlords through other means, they have proved ineffectual.

The 1978 revisions would be improved if they provided for more adequate protection of the landlord without altering the basic purposes or policies of the 1978 Act. Revisions passed by the Senate in 1982 were intended to protect the common interest of all parties, tenants and landlords, when a shopping center bankruptcy occurs. It should be noted that some of the provisions of the legislation applied to commercial leases in general, not solely those in shopping centers. The proposal which passed the Senate in 1982 required that:

- The trustee in bankruptcy should be required to make a decision regarding whether to assign the lease, within 60 days after a trustee in bankruptcy gains control.
- Where a lease has already expired, the trustee in bankruptcy should immediately release the lease to the landlord and not require any waiting period.
- The term "substantial damage" should be defined and clarified to avoid confusion in those instances in which the tenant does not comply with the lease.
- In the event the trustee remains in possession of the leased property during bankruptcy proceedings, the trustee should be required to pay rent. Currently in such situations the trustee is not required to pay rent.

II. Secured Creditors - Mortgaged Property in Foreclosure

Both REALTORS® and Sellers of property may be adversely affected by bankruptcy filings which forces an "automatic stay" of a foreclosure action and prohibits creditors from taking possession of property of the debtor or taking any action to enforce a lien against the debtor.

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BANKRUPTCY (continued)

This automatic stay may impose significant hardship on sellers of property who have become secondary lien holders of property which is in the possession of bankrupt purchasers. The seller, acting as secondary lien holder, is left with an acute cash flow problem without legal authority to foreclose on the property while the trustee of the bankrupt may take up to four months or longer to draft a plan for dealing with the debt. Also, REALTORS® have come under increasing criticism from these former sellers for not properly and thoroughly informing them of the potential dangers of such positions.

STATUS AND OUTLOOK

The Senate Judiciary Committee has tentatively scheduled hearings on a wide range of bankruptcy legislation scheduled for January 24. Although the hearings will focus upon matters concerning the bankruptcy court system, an entire range of bankruptcy legislation will be considered.

The House will only consider substantive bankruptcy legislation after the bankruptcy court structure controversy has been resolved.

REALTOR® POSITION

The NATIONAL ASSOCIATION OF REALTORS® is supporting proposals which would better protect the rights of landlords in tenant bankruptcies and also supports legislation which will better protect sellers of real estate from incurring hardship when foreclosure proceedings begin on mortgaged properties in which they have a continuing security interest.

1/14/83

REGULATORY REFORMBACKGROUND

Over the past ten years, Congress has formulated legislation designed to drastically alter and reshape the manner in which the government conducts its day to day business. Bipartisan support has been given to a myriad of proposals which would examine the methods whereby the executive departments carry out the intent of Congress.

Regulatory reform advanced further in the 97th Congress than in any previous Congressional session. The regulatory reform package which passed the Senate in 1982 and now serves as a basis for future regulatory reform proposals provides for four basic objectives:

- Reduce the cost of compliance with governmental regulation by requiring agencies to examine the economic and non-economic effect of all major rules before adoption;
- Encourage public participation in the rule-making process by requiring agencies to publish an agenda of all rule-making activities;
- Eliminate obsolescence of rules by requiring agencies to periodically review all existing major rules;
- Increase accountability of agencies to lawmakers through the legislative veto.

STATUS AND OUTLOOK

A unanimous Senate vote in the 97th Congress supporting regulatory reform indicates the bipartisan support and foundation for pursuing a regulatory reform package in this session of Congress. Although at this early date no legislative proposal has been presented, a clear consensus exists in favor of regulatory reform.

REALTOR® POSITION

The NATIONAL ASSOCIATION OF REALTORS® has consistently supported legislative efforts to simplify, repeal, or otherwise lighten the regulatory burdens on small business. This policy does not preclude an effective legislative veto concept. These two approaches to easing regulatory burdens on the real estate business are not mutually exclusive and both are therefore supported by the National Association. (See: Legislative Veto Authority)

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LEGISLATIVE VETOBACKGROUND

The Republican Party Platform and candidate Reagan supported a "legislative veto" procedure which would subject proposed federal regulations to Congressional review before final promulgation. The Administration has not formally stated its position although the President's message on regulatory reform cautioned against "undue broadening of control responsibility" by Congress. A White House official has indicated potential support for "legislative veto" applicable only to independent regulatory agencies but has remained publicly silent about its applicability to regulations proposed by executive agencies. Representatives of the Office of Management and Budget have indicated strong opposition, as has the Justice Department.

A case now before the Supreme Court challenges the ability of one House of Congress to suspend a federal agency order. However, in a Ninth Circuit Court of Appeals opinion, the Court attempted to avoid addressing the larger question of separation of powers, and Congressional supporters of a legislative veto provision argue there is no need to delay pending a decision by the Supreme Court. Meanwhile, a three-judge appeals court recently declared the Congressional veto power unconstitutional. Further appeal to the Supreme Court is anticipated in this latest case.

STATUS

The concept of legislative veto has already been incorporated into many laws including those rules promulgated by the Federal Trade Commission. Presently, however, no legislative veto exists for all agency rules and no such proposal has been introduced in this session of Congress.

OUTLOOK

Success of an overall legislative veto proposal hinges at least in part to the significance which Congress attaches to passing regulatory reform. If regulatory reform legislation is given high priority, then almost certainly legislative veto will be incorporated in this proposal. If regulatory reform is not considered to be a high priority item, then legislative veto may be pursued separately.

REALTORS' POSITION

The NATIONAL ASSOCIATION OF REALTORS® supports the concept of a legislative veto over all federal regulations.

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FAIR HOUSINGBACKGROUND

In 1981, substantial changes in the Fair Housing Law, Title VIII of the Civil Rights Act, were proposed to strengthen its enforcement procedures. The NATIONAL ASSOCIATION OF REALTORS® opposed House-passed legislation which created administrative tribunals to handle disputes. Such a procedural structure would have given the federal government the power to be the investigator, prosecutor, as well as the judge of all housing discrimination cases brought pursuant to the Act. After much negotiation, an amendment was agreed upon that would have such cases heard only by the judicial branch, before federal magistrates, as REALTORS had advocated. However, agreement could not be reached on other matters related to the key issue of adjudication, such as the nature of a businessman's defense, so no bill was passed.

During the debate, the NATIONAL ASSOCIATION OF REALTORS® pledged to Senator Baker a major effort to develop an improved Fair Housing Amendments Act. In a letter to President Reagan, and in background statements to HUD Secretary Pierce, this support has been re-emphasized and several particulars noted:

- Clarification of purpose of the Act. As desirable as integration may be as a social goal, when translated into housing quotas, it may well serve to deny to the individual that freedom of choice which is the cornerstone of Title VIII of the Civil Rights Statutes. Is steering by brokers inherently bad, but steering by municipalities, through quotas, benign? These are fundamental questions, and they are the unanswered and real questions under Title VIII.
- Revision of the "Mrs. Murphy" exemption. Under current law, the individual owner may now discriminate in the sale of up to three houses in a year; if a broker is used, however, then discrimination by the agent is punishable. Is discrimination to be based on how housing is marketed?
- Attorney General's role regarding individual complaints. Rather than restrict the Attorney General to certain proceedings under which he must presently operate he should be free to pursue complaints based on their own merits. An act violating the housing discrimination laws should be punishable when guilt is determined by the facts of each individual case.
- Strengthened conciliation and arbitration. HUD cannot now apply sanctions to enforce conciliation agreements. HUD should be given added powers to assure enforcement of informal conciliation procedures, and to create a new process for arbitration, binding on both parties.

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ENTERPRISE ZONE LEGISLATIONBACKGROUND

Stimulation of economic development and employment in distressed urban areas through federal tax incentives to businesses is the basic concept embodied in the Administration's enterprise zone proposal. This proposal, entitled the "Enterprise Zone Tax Act of 1982" was introduced in both the House and Senate during the 97th Congress, however final action did not occur. It is highly likely that the proposal will be reintroduced in the 98th Congress.

Under the Enterprise Zone proposal, state and local governments would nominate zones under federal criteria established under the Urban Development Action Grant (UDAG) program. Once approved as an enterprise zone by HUD, federal tax incentives would apply for a maximum of 24 years, including a four-year phase-out period. The Treasury Department estimates that designing 10 to 25 zones in the first year will cost \$124 million to \$130 million in foregone federal tax revenues. No federal appropriation would be required. Federal tax incentives would include the following:

- a 10 percent nonrefundable tax credit for the construction or rehabilitation of commercial, industrial or rental housing properties;
- the elimination of capital gains taxes for qualified properties (including real property) within the zone;
- the continued availability of Industrial Development Bonds to small businesses, even if they are unavailable elsewhere; and
- the extension of the operating loss carry-over period for zone businesses, and the carry-over of zone tax credits for the 24-year life of the enterprise zone.

STATUS/OUTLOOK

The enterprise zone proposal has yet to be reintroduced into the new Congress. It is likely that Senators Chafee (R-RI) and Boschwitz (R-MN) will again sponsor the legislation in the Senate as will Representatives Kemp (D-NY) and Garcia (D-NY) in the House.

The House Ways and Means Committee showed little enthusiasm for the proposal last year and highly increased Administration efforts will be needed to make passage in 1983 more than a remote possibility.

REALTOR® POSITION

The NATIONAL ASSOCIATION OF REALTORS® supports the continued study of enterprise zones as a potentially viable framework to foster community revitalization and economic growth.

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The NATIONAL ASSOCIATION OF REALTORS® is comprised of more than 1,806 local boards of REALTORS® located in every state of the Union, the District of Columbia, and Puerto Rico. Combined membership of these boards is over 600,000 persons actively engaged in sales, brokerage, management, counselling, and appraisal of residential, commercial, industrial, recreational and farm real estate. The activities of the Association's membership involve all aspects of the real estate industry, such as mortgage banking, home building, and commercial and residential real estate development, including development, construction and sales of condominiums. The Association has the largest membership of any association in the United States concerned with all facets of the real estate industry.

Elected officers are: President Harley W. Snyder, Valparaiso, Indiana; President-elect Donald H. Treadwell, Sr., Southgate, Michigan; First Vice President David Roberts, Mobile, Alabama; Treasurer Budd Krones, Tucson, Arizona.

The Chief Administrative Officer is Jack Carlson, Executive Vice President and Chief Economist.

The Senior Vice President, Government Affairs is Albert E. Abrahams and the Vice President and Legislative Counsel, Government Affairs is Gil Thurm.

Headquarters of the Association are at 430 North Michigan Avenue, Chicago, Illinois 60611. The Washington Office is located at 777 14th Street, N.W., Washington, D.C. 20005. Telephone (202) 383-1000.





TESTIMONY
TO THE
SENATE SELECT COMMITTEE
ON
SMALL BUSINESS

SENATOR LOWELL WEICKER
CHAIRMAN
REGARDING LEGISLATIVE INITIATIVES
FOR MINORITY BUSINESS DEVELOPMENT
FOR THE 98th CONGRESS
FEBRUARY 25, 1983

PRESENTED BY
LAMA
Latin American Manufacturers Association
325 Pennsylvania Ave., S.E.
Washington, D. C. 20003

Stephen W. Denlinger
President

MR. CHAIRMAN --

THANK YOU FOR THIS OPPORTUNITY TO PRESENT TO YOU A SUMMARY OF SOME OF OUR IDEAS FOR LEGISLATIVE INITIATIVES FOR THE 98th CONGRESS

MY NAME IS STEPHEN DENLINGER, AND I AM THE PRESIDENT OF LAMA, THE LATIN AMERICAN MANUFACTURERS ASSOCIATION. LAMA IS A NATIONAL TRADE ASSOCIATION REPRESENTING OVER 500 HISPANIC MANUFACTURING AND HIGH TECHNOLOGY FIRMS THROUGHOUT THE U.S. TECHNOLOGIES INCLUDED IN OUR MEMBERSHIP INCLUDE: CASTINGS, SHEET METAL FABRICATION, FORGINGS, PRECISION METAL FABRICATION, STAMPINGS, METAL COATING AND FINISHING, PLASTICS, CHEMICALS, ELECTRONICS, TELECOMMUNICATIONS, COMPUTER SCIENCES AND SO FORTH.

FOR YOUR REVIEW, THE FOLLOWING ARE A SAMPLE OF THE PRODUCTS OF SOME OF OUR MEMBERS:

- Air filters—military helicopter
- Insert dials—trident missile
- Motor control centers
- Battery chargers
- Electronic power supplies
- Shrike missile cables
- Spiral bevel gears
- Sidewinder missile fins
- Smoke projectile—155 M
- Practice bombs & tow targets
- Radar domes for Navy ships
- Multi-layered PCB assemblies
- Desk-top computer
- Engine oil strainer—Army tank
- Electrical generator sets to 500KVA
- Air duct segments—J-79 jet engine
- Brake shoes—rail cars (AAR Specs)
- Secure telephone sets—Navy
- Radar avionics chassis
- Digital switching power supplies
- Magnetic particle & x-ray testing
- Hydraulic ground support equipment
- Engine mounts—L1011 Tristar
- Bombay door webs—B-62
- Precision tube assembler—C-141
- Submersible motor controls
- Coolant flow detectors—tow missile
- Snowplows
- Desecant systems—space shuttle
- Army tank sighting devices
- Suspension kits—M-113 APC
- Fuel cell plates—space shuttle
- Nuclear waste containers
- Awacs structural supports
- Stinger surface-to-air missile trainer
- Computer interfaced access control security systems
- Heat exchange cooling kits—armored personnel carriers
- Analog data signal processor cold plate chassis
- Aluminum control activator housings—tolerances to .0005
- Complex aluminum electronic receiver chassis
- High frequency communications equipment
- Hydromechanical transmission housings
- Fed-thrus caps, ferrules & tubes—nuclear power cells
- Sidewinder missile aircraft attachment brackets
- Precision optics—cameras and satellites
- Transformers—single & three phase ferroresonant & linear
- Precision gears—Mark 48 torpedo—M-60 & M-1 Tanks
- Waveguides, microwave components & ferrite devices
- Conveyors and material handling equipment
- Custom enclosures for computers & communications equipment
- Internal spur gear housing (5,000 pound castings)
- Heat converter & exchanger—nuclear power plant
- Bell crank—internal moving part for F-104 jet engine
- Control panels for pipelines and wastewater systems
- Plastic injection molded automotive & aircraft parts
- Flame cutting, leveling & welding—9,000 pound fabrications
- Cast aluminum medical & aerospace components
- Safety control panels—nuclear power rod select—NRC Specs
- Thermocouples, thermowells and related temperature devices
- Computer interfaced telephone interconnect systems
- Titanium forgings—aircraft & missile applications
- Computer based nuclear re-entry body vulnerability analysis
- Carbon steel forgings for pneumatic applications
- Precision machining of supersonic aircraft wing spars
- Multiplexers for computer interface applications
- Design and manufacture carbide saw blades
- Pressure relief valve—109 Howitzer
- Electrical switchgear to 35,000 volts

MR. CHAIRMAN, OUR LEGISLATIVE RECOMMENDATIONS RELATE PRIMARILY TO THE ISSUE OF INCREASED MARKET SHARE FOR HISPANIC AND OTHER MINORITY BUSINESSES. AS YOU KNOW, MINORITY BUSINESS IS STILL PRECARIOUSLY BALANCED AT THE FRINGES OF OUR ECONOMIC SYSTEM. OUR RECOMMENDATIONS ARE AS FOLLOWS:

1. DOD SHOULD SUBMIT ITS MBE GOALS TO SBA BY MILITARY INSTALLATION AND NOT IN THE AGGREGATE - TOO MANY MILITARY INSTALLATIONS ARE NOT PARTICIPATING MEANINGFULLY IN THE 8(A)/MINORITY BUSINESS PROGRAM.
2. SBA'S REGIONAL ADMINISTRATORS AND DISTRICT DIRECTORS SHOULD INTERACT DIRECTLY WITH MILITARY INSTALLATIONS IN THEIR AREAS TO PROMOTE INCREASED MBE UTILIZATION.
3. SBA SHOULD ESTABLISH A SPECIAL UNIT AT THE CENTRAL OFFICE TO PROMOTE THE INVOLVEMENT OF QUALIFIED 8(A) FIRMS IN HIGH TECHNOLOGY PROGRAMS OF THE FEDERAL GOVERNMENT, PARTICULARLY DOD.
4. SBA SHOULD ESTABLISH A TASK FORCE TO DEVELOP A SEPARATE SIZE STANDARD FOR THE 8(A) PROGRAM IN CONSONANCE WITH THE BUSINESS DEVELOPMENT PURPOSES OF THE 8(A) PROGRAM, AND WITH GREATER EMPHASIS ON MOVING THE MINORITY BUSINESS COMMUNITY TOWARD A FULL AND EQUITABLE PARTICIPATION IN FEDERAL CONTACTING.

5. A UNIFORM SUPPLIER APPLICATION FORM SHOULD BE DEVELOPED FOR THE SUBCONTRACT ARENA, SIMILAR TO THE GOVERNMENT FORM 129, FOR PURPOSES OF REDUCING THE TREMENDOUS PAPERWORK OF SMALL COMPANIES SEEKING TO DO BUSINESS WITH PRIME CONTRACTORS.
6. CRIMINAL PENALTIES FOR MBE/8(A) FRONTS SHOULD BE LEGISLATED (5 YEARS JAIL/\$50,000 FINE)
7. LAMA SUPPORTS VIGOROUS PROSECUTION OF THE BID-RIGGING SCHEMES IN PUBLIC PROJECTS WHICH HAVE COME TO LIGHT IN RECENT MONTHS -- THE MAGNITUDE OF THIS CORRUPTION IS STUNNING -- NOTHING DRAINS PUBLIC CONFIDENCE IN OUR GOVERNMENTAL INSTITUTIONS MORE THAN CORRUPTION.
8. GRAFT SHOULD BE WEEDED OUT OF FEDERAL PROCUREMENT -- ALL FEDERAL OFFICIALS INVOLVED IN DIRECT PROCUREMENT SHOULD BE REQUIRED TO SUBMIT TO LIE DETECTOR TESTS WHEN THERE IS REASONABLE CAUSE TO SUSPECT GRAFT -- SUCH TESTS COULD BE ADMINISTERED BY THE INSPECTOR'S GENERAL OF THE AGENCIES WITH COURT APPROVAL AND REVIEW (SIMILAR TO THE PROCEDURE FOR WIRETAPS) -- IF SUSPECTED OFFICIALS FAIL THE TEST, THEY SHOULD BE REMOVED -- IF THEY REFUSE TO TAKE THE TEST, THEY SHOULD BE REMOVED -- THIS SHOULD BE LEGISLATED ON A PILOT BASIS THIS SESSION.

THANK YOU FOR THE OPPORTUNITY TO PRESENT THESE RECOMMENDATIONS.

Statement of
Clarence H. Braddock
President, Black President's Roundtable
Before the
United States Senate
Committee on Small Business

February 25, 1983

Attachments

Mr. Chairman, I am Clarence Braddock, President of the Black Presidents' Roundtable, an organization of the presidents of over 200 black-owned and operated firms. I am also the president of Automated Sciences Group, Inc., an engineering services and computer related analysis firm. Mr. Chairman we appreciate this opportunity to assist your committee in charting its legislative agenda and oversight activities for the next two years. We congratulate you and your committee on your dedicated efforts on behalf of small and small minority businesses. We particularly congratulate the efforts of Senator Cranston and yourself in co-sponsoring the amendment to the recently passed Surface Transportation Act with its 10 percent set-aside provision for small and small minority business. We also commend you on the introduction of S. 273 to reauthorize the Small Business Administration's Section 8(a) pilot procurement program.

With your permission, Mr. Chairman, I would like to submit a series of documents which will constitute my full statement for the record and summarize it orally.

Mr. Thomas Farrington, coordinator of the Black Business Support Group to the NAACP Black Business Advocacy/Fair Share Program, was to appear with me this morning but was unable to do so. The Black Business Support Group joins with DPR in this statement.

The Black Presidents' Roundtable has previously appeared before this committee and has maintained continuous dialogue with committee staff members regarding the problems confronting small minority businesses in their struggle to achieve competitive viability. This committee has been extremely responsive to our requests for discussion and supportive of our efforts to solve our problems.

However, the Black Presidents' Roundtable remains very concerned about the ineffectiveness of legislatively mandated programs to assist the small business community in general and the small minority business community in particular. We are also concerned about the continuing failure of Federal agencies, charged with responsibility for program implementation, to effectively address and solve those problems and issues central to the development of small minority business enterprises.

The Federal Government is leading minority business programs down the road to disaster. This is caused by several overlapping problems, the most visible of which is the fact that the 8(a) program, the most effective federal mechanism developed to-date to increase the market share and viable participation of minority Americans in the U.S. economic mainstream has abandoned its legislatively mandated purpose to promote the competitive viability of minority-owned firms. The need for MBEs to become competitive in and have access to the government marketplace is a critical complement to the very gradual penetration of MBEs into the private sector.

Nobody likes to discuss the issue of discrimination in the marketplace, but careful analysis of the facts shows that for minority entrepreneurs, it just will not go away. A ten-year analysis of the Black Enterprise's top 100 firms illustrates that the most successful black-owned firms have not achieved their success from competitive federal government procurements. On the contrary, the 1982 listing of the BE 100 indicates that over 33 percent were subsidiaries of or distributors for Fortune 500 companies (including 29 auto dealerships), over 25 percent were participants in government-supported sheltered market programs, 20 percent were selling their products primarily to black consumer markets and 17 percent were primarily selling goods and services to the private sector.

Over the ten year history of the BE 100 listing, not a single major success story has been identified of a black-owned firm which generated the majority of its sales from competitive federal government procurements. This shocking data underscores the importance of a government commitment to programmatically revitalize the concept of "competitive viability" as well as to open the doors of government contracts to minority firms that are not in the sheltered-market programs.

The Small Business Administration's (SBA) role is to act as an advocate for all small businesses and to implement programs to foster the development of small business enterprises.

The SBA programs which have the greatest potential for fostering the development of small minority businesses are the Section 8(a) program and the subcontracting program mandated by Section 211 of Public Law 95-507. The 8(a) program provides an effective mechanism for providing small minority firms with access to an otherwise largely inaccessible federal government procurement marketplace and resultant opportunities to convince otherwise skeptical government agencies that minority firms can perform effectively. The 8(a) program also provides for a variety of technical and financial assistance to minority firms to assist them in increasing sales and income, resolving bonding problems and improving credit capabilities. However, the SBA program which has created a great potential for stifling the development of small minority business is the Fixed Program Participation Term (FPPT) implemented by the SBA in response to Public Law 96-481. These FPPTs are having the effect of removing from the 8(a) program those firms which are closest to developing credibility and have the greatest potential for achieving competitive viability.

The Section 211 subcontracting provisions of PL 95-507 have the same potential with respect to providing minority firms with access to and development of creditability within the federal

prime contractors sector. However, we have observed a significant increase in the number of federal prime contractors that have been found in some manner of noncompliance with PL 95-507 and thus the potential is not yet realized.

In addition, we are very concerned with recent OMB actions to revise OMB circular A-76 to encourage consolidation of commercial activities into a single statement of work for cost comparison and potential contracts. This policy will effectively remove important contract opportunities from consideration under the 8(a) program. Further, the SBA's announced intent to petition Congress to abolish the SBA direct lending program have the potential for damaging the efforts of small and small minority business to improve their credit capabilities.

In order to realize the positive potential of the 8(a) program and PL 95-507 and to diminish the negative potential of the proposed OMB revisions to Circular A-76 and the proposed abolishment of the SBM direct lending program, the Black Presidents' Roundtable respectfully submits the following recommendations for this committee's consideration in planning your legislative agenda and over activities. Many of these recommendations are summarized from the Black Presidents' Roundtable Policy Statements and Recommendations on Selected Minority Small Business Issues for the 1980's dated December 1980 which was previously provided to the staff of this committee and is included in my full statement for your further attention.

1. Take actions to cause the repeal of 13 Code of Federal Regulations (CFR) 124.1-1(f) which establishes Fixed Program Participation Terms (FPPTs) which do not comply with the requirement of PL 96-481 to establish graduation dates. These FPPTs are having the effect of removing from the 8(a) program those firms which have the greatest potential for developing competitive viability without any provisions for

a transition mechanism to reduce the shock of entry into the competitive marketplace. In lieu of FPPTs, require the SBA to establish graduation criteria, similar to an undergraduate degree program, for each firm against which progress towards competitive viability can be measured and firms graduated, put on probation, or expelled dependent upon the passing or failing of such defined graduation criteria. In addition, require the SBA to evaluate the establishment of unique size standards for the 8(a) program particularly with respect to whether all or only some percentage of 8(a) contract revenues and the value of subcontracts under 8(a) contracts should be included in size determination.

2. Take actions to cause the SBA to develop a transition program for those firms nearing graduation and those firms recently graduated. Such a transition program could include the establishment of a small minority business set-aside program analagous to the existing small business set-aside program. Such a transition program could be conducted similar to a graduate degree program with a time limit within which program objectives must be achieved.
3. Conduct oversight hearings to determine the effectiveness of the subcontracting provisions of PL 95-507 to provide a basis for a more aggressive enforcement of those subcontracting provisions.
4. Take actions to either discourage consolidated and umbrella contracting or provide that such consolidated and umbrella contract opportunities be reserved for small busines set-asides or 8(a) set-asides to the maximum extent practicable.
5. Take actions to continue the SBA direct lending program.

6. Take actions to provide for direct contracting by federal agencies to 8(a) firms with SBA serving as a certification agent with authority and responsibility for 8(a) program entry, continuation, and termination or graduation.

Mr. Chairman, thank you for the opportunity to appear before your committee. I would be pleased to answer any questions you or your colleagues may have.

ATTACHMENTS

1. POLICY STATEMENTS AND RECOMMENDATIONS ON SELECTED MINORITY SMALL BUSINESS ISSUES FOR THE 1980's - The Black Presidents' Roundtable, December 1980, (As Reused February 1983)
2. A CASE FOR GOVERNMENT SUPPORT OF MINORITY ENTERPRISE - EXECUTIVE SUMMARY - Mark Battle Associates, Inc., August 1981
3. BENEFITS OF MINORITY BUSINESS ENTERPRISE TO THE U.S. ECONOMY - Center for Systems & Program Development, Inc., August 1981
4. NAACP BLACK BUSINESS ADVOCACY PROGRAM - NAACP, August 1982
5. TESTIMONY BY LAWYER A. MARTIN ON BEHALF OF THE BLACK PRESIDENTS' ROUNDTABLE BEFORE THE ADVISORY COMMITTEE ON SMALL AND MINORITY BUSINESS OWNERSHIP - April, 1982
6. TESTIMONY BY ROY LITTLEJOHN, PRESIDENT ROUNDTABLE ASSOCIATES BEFORE THE COMMITTEE ON SMALL BUSINESS - U.S. House of Representatives, June 1982
7. A COMPETITIVE MINORITY SET-ASIDE PROGRAM - Mandex, Inc., August 1981

POLICY STATEMENTS AND RECOMMENDATIONS
ON
SELECTED MINORITY SMALL BUSINESS ISSUES FOR THE 1980's

The Black Presidents' Roundtable
December, 1980

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INTRODUCTION

The Black Presidents' Roundtable is an organization of the presidents of over two hundred firms in the greater metropolitan D.C. area and several areas across the country. We are presenting the information contained in the following policy statements for consideration and action by policy makers whose responsibilities require that they be cognizant of issues impacting minority business development. These papers represent the views of minority company presidents who are concerned about the continuing reluctance of federal officials to isolate and solve those issues and problems central to the development and financial maturation of minority business enterprises. The issues we have isolated are not all encompassing of factors affecting minority businesses. However, they do comprise the major elements of policy considerations necessary for improvement on existing programs and implementation of new policy initiatives.

ISSUE 1: Minority Business Enterprise as a Component of National Economic Growth and Development.

The economic recession plagues all aspects of American life. The reduction of economic growth has caused serious social dislocation and threatened our national security. For the United States to recover its economic strength, a comprehensive program of national economic growth and revitalization must be launched. In such an endeavor, the minority business community has an important role to play as a full partner with other components of the American business and corporate community. Federal, state and local governments must support business growth to ensure that all areas of the private sector are producing at full capacity.

While many components of the business community are suffering temporary set backs in productivity, minority business is bound by structural underdevelopment. There are economic, social and national security costs to this society associated with the underdevelopment of minority business. These costs are manifested in lost tax revenues and the loss of unique employment opportunities. They also contribute significantly to instability of the minority community. Business institutions rooted in minority communities across the country lessen dependence on government income support programs and enhance local stability. Strong minority business contributes to the economic health and security of the nation.

Major Federal support for minority business enterprise development began under a Republican administration over ten years ago. Executive Orders 11458 and 11625 signed in 1969 and

1971 established the Office of Minority Business Enterprise, since renamed the Minority Business Development Agency. These actions along with other executive initiatives and legislation such as P.L. 95-507 have helped establish minority business enterprise development as a component of our national economic policy. Programs already established under these laws and orders must be strengthened and enhanced to facilitate the maximum productivity of the minority business community.

The following papers outline specific issues and recommendations which cover a wide ranging program for minority business enterprise development. The recommendations listed immediately below address policy and legislative matters of broad, national impact.

RECOMMENDATIONS:

1. That the incoming administration include presidents of minority companies and officials of organizations which represent minority business enterprise in the development of national minority business policy.
2. Congress should pass the "Urban Jobs and Enterprise Zone Act" proposed by U.S. Representatives Jack Kemp and Robert Garcia with modifications to provide specific incentives for minority companies to participate in the economic development of depressed areas.
3. The Federal government should offer financial and administrative inducements to state and local governments to enhance minority business enterprise.
4. The Congress should pass legislation proposed by U.S.

Representative Parren Mitchell to establish the Minority Business Development Administration as a legislated, permanent function of the U.S. Department of Commerce.

5. The Federal government should facilitate minority business access to finance and capital by:
 - a. Increasing its deposits in minority banks through the Minority Bank Deposit Program.
 - b. Congressional action to authorize the Small Business Administration to subsidize the sale of Minority Enterprise Small Business Investment Corporation (MESBIC) debentures to the Federal Financing Bank.
6. The Federal government and the Congress should strengthen its oversight of the use of minority subcontractors by Federal prime contractors and suspend contract activity with the prime until such compliance with the subcontracting plan requirements of P.L. 95-507 is achieved.

ISSUE II: Strengthening the 8(a) program.

The 8(a) set-aside program of S.B.A. for over a decade, has been the principal government vehicle for assisting the development of minority business opportunity. Administration of the program over the years has fallen far short of the level and quality of effort necessary for the development of companies in the 8(a) portfolio to a level of maturity that provides maximum assurance for their successful continuation as corporate entities in the general marketplace. Continuing dialogue between the minority business community and officials of the Small Business Administration since the inception of the 8(a) program has not resulted in the quality of program administration we consider necessary for effective program implementation. The attached paper, "S.B.A. Minority Business Operations-Agenda for Improvement", is an example of such dialogue with the outgoing Administration.

The passage of P.L. 95-507 in October 1978 provided a statutory basis for S.B.A. to provide "maximum practicable opportunity for the development (emphasis added) of small business concerns owned by members of socially and economically disadvantaged groups." P.L. 95-507 provides S.B.A. with an array of program tools for fostering minority business development. Unfortunately, S.B.A. has not applied sufficient management initiative to aggressively implement the Congressional mandate.

There are several key problem areas in the administration of the 8(a) program which if corrected will greatly improve the prospects for effective development of firms in the 8(a)

portfolio. Among these are (1) lack of clear policy guidelines for program certification, continuation and completion based on quantifiable and economically defensible criteria; (2) the lack of program staff who have sufficient experience and working knowledge of "real world" business practices and problems; (3) an insufficient level of funding to adequately staff the various elements of the 8(a) program; (4) a definite weakness in S.B.A.'s advocacy of minority business development; and (5) an inadequate perception by S.B.A. of the need to differentiate the service requirements of 8(a) firms at varying levels of their development within the programs.

RECOMMENDATIONS:

1. That S.B.A. take appropriate administrative action to develop clear policy guidelines on eligibility for, continuation in and completion of the 8(a) program.
2. That S.B.A. recruit and assign persons at the national regional and district levels with practical business experience to staff the critical elements of the 8(a) business development program.
3. That S.B.A. increase its advocacy of minority business development through greater co-ordination between the Office of Small Business Advocacy and the Associate Administrator for Minority Small Business and Capital Ownership Development.
4. That S.B.A. establish a policy for differentiating the service requirements of 8(a) firms at varying stages of their development within the program. We recommend

further that the following categories of firms be established within the 8(a) portfolio.

Category A

Firms that only require the processing of 8(a) contracts for which they have specifically marketed and for which there has been a specific designation by the Agency. Those firms would be eligible for S.B.A. assistance under Section 211 of P.L. 95-507 and other private sector assistance.

Category B

Firms that will not require the full range of assistance from S.B.A. other than limited marketing; financial, e.g. business development expense and advance payments; technical assistance; the processing of contracts and the designation of contract competition where indicated by the Agency.

Category C

Firms that have received few or no contracts and will require the whole range of S.B.A. assistance. The Roundtable offers to assist S.B.A. in developing the criteria by which firms in the 8(a) program would be categorized. We recommend further that S.B.A. encourage the sponsorship of Category C firms by Categories A and B as subcontractors with the incentive of lifting the size standard ceiling.

5. That S.B.A. aggressively seek a sufficient level of funding to implement these recommendations and the developmental mandate of P.L. 95-507.

ISSUE III: Clarifying the definition of "Socially and Economically Disadvantaged" as used in the Administration of the 8(a) Program.

Issues and Background

The principal eligibility requirement for entry and continuation in the 8(a) set aside program of the Small Business Administration is that a minority controlled firm be determined socially and economically disadvantaged. Administrative policies have not been structured to consider the various factors critical to meeting the capital, credit, technical assistance and marketing needs of minority firms at various stages of their development.

Companies may be denied eligibility for continuation in the 8(a) program due to insufficient consideration of economic data which reflects their relative ability to develop within their respective sectors of the economy. Eligibility may also be denied because the personal assets of an individual are viewed as too great to qualify him/her as economically disadvantaged without consideration of other business factors. The problems created by the lack of definitive administrative criteria for economically disadvantaged firms have worked at cross-purposes to the Congressional findings of P.L. 95-507 "that it is in the national interest to expeditiously ameliorate the conditions of socially and economically disadvantaged groups" and "that such conditions can be improved by providing the maximum practicable opportunity for the development of small business concerns owned by members of socially and economically disadvantaged groups" and

"that such development can be materially advanced through the procurement by the United States of articles, equipment, supplies, services, materials, and construction work from such concerns".

Recommendations:

1. That S.B.A. in its determination of economic disadvantage for 8(a) firms utilize economic criteria which consider the relative economic strength and circumstance of each firm based on the following factors:
 - (a) convertability of personal & business assets
 - (b) credit availability
 - (c) access to venture and equity capital
 - (d) market accessibility & marketing capacity
 - (e) technical assistance availability
2. That through the application of the above criteria, firms be evaluated by their progress toward the achievement of a level of financial maturity that provides realistic prospects for sustained growth and development outside the 8(a) program.

ISSUE IV: Establishing non 8(a) Minority Business Set Asides

Background

Approximately 2000 minority firms are currently certified to participate in contract opportunity generated by the 8(a) set aside program of the U.S. Small Business Administration. Although the use of certified firms should be encouraged and expanded, there are other minority firms available, that do not participate in the 8(a) program that also should be used. However, federal agencies have tended to look to 8(a) firms only in meeting their minority contract requirements. This has severely limited federal contracting opportunity for thousands of non 8(a) minority firms. There are three important reasons for this limitation.

- (1) 8(a) contracts are much quicker to process and enable agency program managers to meet their procurement requirements in a more timely manner.
- (2) Federal agencies have made heavy use of 8(a) firms in their efforts to meet the M.B.E. goal of tripling minority procurement set by the outgoing Administration.
- (3) Federal agencies have failed to establish small business set aside programs for minority firms that are not 8(a) certified.

There are many minority firms that are desirous of government business but for various reasons do not meet the eligibility requirements for 8(a) certification. An additional number of minority firms who could meet the eligibility requirements are

denied access to the 8(a) program because of the apparent limitation of the current 8(a) portfolio to 2000 firms. Many non 8(a) minority firms are small businesses that have limited their operations to the private sector and often do not require the full range of services available to 8(a) firms. However, they do require special assistance in overcoming constraints in the marketplace which result from their minority status. These companies know very clearly that government contract opportunity has historically been an important vehicle for the development and growth of small businesses. They also recognize that it should not be necessary for them to become 8(a) certified in order to participate in Federal contracting opportunities. A substantial set-aside program for non 8(a) firms would assist greatly the efforts of such firms to access government contract opportunities and expand their markets in the private sector.

A set-aside program for non 8(a) minority firms is also vitally needed as a bridge to the general marketplace for firms that complete the 8(a) program. Legislators and government administrators frequently overlook the fact that the purpose of the 8(a) program is business development. The need for providing post-program support to firms that may be ready to move beyond the 8(a) program has not been addressed adequately, nor has this need, been given serious consideration as a crucial factor in the survival and maturation of companies developed within the 8(a) program. The establishment of a minority small business set-aside program would be considered a major initiative in the furtherance of minority business development.

RECOMMENDATIONS:

1. The Administration through the Office of Federal Procurement Policy should establish a minority small business set-aside program in each federal agency to facilitate government contract opportunities for non 8(a) firms and to provide a "developmental bridge" for those firms who may be ready to move beyond the 8(a) program.
2. Companies would be eligible to participate in the program by certifying that they are small and minority owned. Social and economic disadvantage would not be factors in the determination of eligibility for this program.

ISSUE V: Enhancing the Marginal Profitability of Minority Companies

BACKGROUND:

Despite numerous news stories to the contrary, most small consulting firms providing professional services to the Federal government operate at marginal profit levels.

This is particularly true for minority business enterprises who for the most part have had limited success in negotiating fees above the 8.0 percent level. The cost of borrowing money as of December 1980 is approaching 20% for prime customers, a group to which most minority firms do not belong. Federal payment of invoices submitted by firms for work already completed typically takes from 30 to 90 days. The cost of borrowing money is not an allowable contract expense, and hence, must be paid out of a company's bottom line or profit.

Thus, it is the financial reality that many firms must borrow money at the current exorbitant rates from 30-90 days, but the interest rates must be financed by fees that may well be below those rates. Borrowing money is a necessity for most minority firms who are under-capitalized and have little access to investment resources. Clearly, the current state of the economy is having a particularly serious impact on the profitability of minority business enterprises.

Two solutions to this problem are proposed. First, there should be a change in procurement regulations making the interest paid on money required to finance government contracts because of the excessively slow rate in which invoices are paid an allowable

expense.

A second solution already exists, but is currently limited to a specified number of non-profit and a few for profit corporations. Reference is made to a mechanism operated within the DEFAS system, through which an agency-specific ("single point") and/or a contract specific Federal Reserve Letter of Credit can be made available to authorized firms pursuant to Treasury Circular 175, 31, CFR, Part 205.

Organizations and firms who have such a Letter of Credit are permitted to draw down against contract funds twice a month through their banks and are required to reconcile these advances with actual expenditures on a once a month basis.

The advantages of such a "draw-down" system for minority firms are obvious. Excessive interest rates are avoided and there can result at least some rate of return on contracts acquired. The viability and stability of minority firms will be enhanced, and hence their ability to hire members of the community and make a larger contribution to the economy of the nation.

Should the current system be unable to accommodate those firms desirous of participation, a parallel system could be developed to serve the needs of legitimate minority firms doing business with the Federal government, the number of which at present does not greatly exceed 2,500.

RECOMMENDATIONS:

The problems of financing government contracts which are faced by minority firms in particular should be addressed in a variety of ways, including:

1. Direct Federal agencies to include interest as a specific contrast cost (overhead).
2. Direct Federal agencies to consider the cost of money as part of fee considerations.
3. Set up a DEFAS system, approved automatic monthly advances for small/minority firms on a contract by contract and/or agency basis.
4. SBA should provide financing of 8(a) firms on a rolling account basis to be repaid by assigned contracts.

ISSUE VI: Facilitating MBE Entry Into the Economic Mainstream
through Creative Business Loan Programs.

BACKGROUND:

Although minority business enterprises have special needs, they also have many of the same requirements as do all businesses, large and small. One of the most important is the need for capital for operating, development and expansion purposes.

There are Federal business loan programs in existence which, if redirected and/or expanded, could meet many MBE capitalization needs. They are not widely used by minority firms. These firms are often directed by assisting agencies in fact to "minority" loan programs which provide limited support on much less desirable terms.

There are two long-term programs which are currently available for example which can serve as a valuable resource to eligible minority businesses. One is the Business and Industrial Loans (B&I), administered by the Farmers' Home Administration, which provided over \$1.26 billion to 2,000 borrowers in FY 1979. Several individual loans were in excess of \$10 million; loans can be made to corporations developing job opportunities in rural America for periods up to 30 years.

The Economic Development Administration loan and loan guarantee program involved \$600 million provided through 200 loans on loan guarantees in FY 1979. Although these loans are typically somewhat smaller (the largest loan made was \$9.3 million in FY 1979), again the term of the loan can be 25 years. Both of these programs, of course, are currently available for

minority participation. But these and other loans could be considered as part of an expanded effort to promote the competitive viability of minority business enterprises, as well as to provide broader opportunities to MBE in revitalizing economically distressed areas in the nation.

Existing SBA programs should also be re-examined. Lending ceilings are considerably less. The maximum Economic Opportunity loan that can be made is \$100,000. (The average EO loan in FY 1979 was \$35,445.) Regular SBA loans can be provided up to the level of \$500,000 under certain circumstances, although the \$350,000 limit is more customary. SBA loans are typically shorter-term as well.

Although these programs are obviously helpful, they clearly could be expanded. Minority firms should be encouraged by SBA technical advisors to seek assistance through all of the agency's loan programs, and not limit their approaches to the Economic Opportunity Loan alone. Minority policy-makers are needed in the full range of SBA's financial and investment activities so as to ensure that the needs of all small businesses (minority and non-minority) are addressed.

Recommendations

1. Steps should be taken to actively encourage the participation of minority firms and lending institutions in existing Federal loan programs that are not set-aside for minority participation.
2. A careful review of SBA loan programs should be made to ensure comparability between Economic Opportunity Loan and

other SBA loan programs, as well as to ensure adequate participation of MBE in all loan programs offered by the agency.

3. Consideration should be given to legislation to construct an alternative loan program, designed to meet the needs of minority firms at different stages of development, to be formulated with the active participation of minority trade associations.
4. The Black President's Roundtable strongly recommended that minority play key roles in all of SBA's programs dealing with finance and investment activities in support of small businesses.

ISSUE VII: Improving Minority Contractor Access to Bonding
Bonding

Minority construction firms and developers have been plagued for generations by the denial of access to surety bonding. Present circumstances make it very difficult for minority contractors to obtain surety coverage for their projects. Those familiar with the subject generally agree that bonding difficulties comprise the largest single obstacle to equitable participation by minority contractors in government procurement programs and private sector construction projects as well. The impact of surety bonding restraints in construction work for the federal government has seriously retarded the growth of minority construction opportunity in the private sector.

For example, the federal Miller Act requires that contractors provide bid, performance and payment bonds whenever they perform on construction projects greater than \$25,000.00 for a federal agency. Historically, many non-minority contractors have utilized federal construction projects as a significant base for expanded operations in the private sector. If minority contractors are to have equal opportunity to perform in the public and private sectors, these contractors must have equal opportunities to obtain the required bonds.

Bonds are written by a relatively small number of private surety companies. The processes by which these sureties underwrite (screen) and market their bonds is not regulated by the federal government and is ineffectively regulated by the states. Moreover, the practice of bond underwriting is extremely

complicated, subjective and conservative. These factors are significant aspects of the reason why the surety industry has not met the bonding needs of minority contractors.

Various federal agencies including the Department of Transportation, Housing and Urban Development, Commerce and the U.S. Small Business Administration have attempted to establish programs or activities to improve the abilities of minority contractors to obtain bonds. In our opinion, none of these "technical assistance" programs have resulted in an adequate level of measurable or significant results. The technical assistance and surety bond guarantee programs of S.B.A. are examples of such activities. Unfortunately these programs have not been even moderately successful. Although there are many reasons for the failures of these programs, the largest single reason is the lack of surety expertise on the part of government officials who do not have specific experience in, or adequate knowledge of the complicated field of bonding.

Recommendations:

In order to facilitate equal surety opportunities for minority contractors, the administration should:

1. Conduct extensive research to obtain comprehensive information about surety. The Insurance division of the Federal Emergency Management Agency would be the appropriate source for such information.
2. Make detailed bonding information available to all agencies which conduct procurement activities.
3. Fund and support private sector programs to improve the

Recommendations con't

- abilities of minority contractors to obtain bonds through the existing surety industry.
4. Improve communications and cooperation between government agencies, minority contractor associations, surety companies and surety producers.
 5. Support the establishment of minority owned and controlled surety companies (and related financial entities) to provide additional bonds.
 6. Improve and strengthen existing government activities relating to surety. For instance, the S.B.A.'s bond guarantee program should be improved by:
 - A. Adding bond specialists to central and field staffs.
 - B. Increasing the maximum guaranteed bond to \$10,000.
 - C. Encouraging greater participation by major surety companies.
 - D. Coordinating bond activities with other S.B.A. programs.
 - E. Increasing the efficiency with which bond guarantee requests are processed.

ISSUE VIII: Increasing Minority Business Enterprise Export Development**Background**

During this period of negative U.S. trade balances, it is in the national interest to expand exports through all components of the private sector. The minority business community comprises a unique, untapped resource with vast potential to exploit a variety of foreign markets. Like other components of the private sector, minority firms need varying degrees of federal assistance to enable them to participate in international commerce. There are numerous export support programs disbursed throughout the Federal government, however, few of them are designed specifically to promote minority export business. There is no single program, sufficiently staffed, which can provide comprehensive services to minority firms in export promotion. There is no central interagency clearinghouse or "one stop" counseling and referral service.

Programs which have operated to assist minority exporters have generally been ad hoc in nature and poorly supported. This situation handicaps minority business persons in their search for government assistance in the areas of export finance, market identification and risk insurance. The mere variety of programs can be overwhelming. The Department of Commerce, International Trade Administration maintains several programs to provide market identification support, counseling and training. The Small Business Administration has counseling, training and loan guarantee functions. The Overseas Private Investment Corporation

has loan and loan guarantee programs, it offers risk insurance and supports spot visits and feasibility studies. There are numerous similar export assistance programs in the Export-Import Bank, the U.S. Agency for International Development and the Department of Agriculture as well as others.

What is needed is a central clearinghouse which would coordinate an aggressive interagency minority export/trade program.

Recommendations

1. Establishment of an interagency council which would coordinate a government-wide program aimed at minority business export development. The council would include but not be limited to the U.S. Department of Commerce, the Small Business Administration, the Export-Import Bank, the Overseas Private Investment Corporation and the U.S. Agency for International Development.
2. Establishment of a multi-role staff in the U.S. Department of Commerce to perform the following functions:
 - a. Provide a "one stop" clearinghouse to link active and potential minority exporters with the government programs best suited to their needs.
 - b. Provide long term assistance to a significant number of active and potential minority exporters in packaging deals. Such assistance could include counseling, training, acquiring loans and guarantees, insurance or any other support which may be needed.
 - c. Maintain a centralized data base of active and potential minority exporters.

3. Through their regional staffs, agencies with export promotion programs should establish aggressive programs to recruit minority firms to participate in their programs especially those which provide financial support.
4. The Minority Bank Export Sales Financing Program supported by the Export-Import Bank should be expanded.

**A CASE FOR
GOVERNMENT SUPPORT OF
MINORITY ENTERPRISE**

EXECUTIVE SUMMARY

PREPARED FOR:

PROGRESS, INC.

AND

**THE BLACK PRESIDENTS' ROUNDTABLE ASSOCIATION
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EXECUTIVE SUMMARY

CHAPTER I

INTRODUCTION

It is no longer debatable that the small business sector of the U.S. economy has been the primary source of new jobs throughout the seventies. Neither is it arguable that America's 46 million minorities are disproportionately dependent on government social subsidies. Yet, government programs and policies do not exploit the compelling evidence that minority American businesspersons all over the nation represent an untapped, hungry subsector of the small business community. These budding entrepreneurs are an eager but tremendously underutilized source of job creation, innovation, entrepreneurial creativity and competition in an economy facing massive needs for economic stimulation and job creation in the central cities.

In order for minority businesses to contribute to the economy in proportion to the economy's need for their vitality, government policymakers will need to face a number of hard realities regarding the types of partnerships and new directions required to tackle difficult urban revitalization problems. Foremost among these is the evidence that a fraction of the funds devoted over the years to dependency programs could be cost-effectively utilized in development programs. Effective development programs can reduce the long-term need for government social welfare expenditures.

Minority business development programs have borne the brunt of years of uncomplimentary publicity. The potential long-term benefits to the U.S.

taxpayer of such programs have not been conveyed to the public in a balanced way. This document examines the current status of minorities and minority businesses in the United States, reviews the effectiveness of the federal government's most visible minority business development program, and makes several specific recommendations for consideration by government policymakers.

Particular attention is given to the 8(a) development program of the U.S. Small Business Administration (SBA), which is currently in the process of terminating its largest and, in some cases, its fastest growing 8(a) participant firms. This report specifically examines the potential effectiveness of this program and the importance to the long-term national interest of creating more larger, fast growing, minority-owned businesses, as well as more minority-owned businesses of any size.

STATEMENT OF THE PROBLEM

There is a critical and immediate need for development among the 46 million minority Americans who are not significant participants in the mainstream of U.S. business and who are disproportionately dependent on government social programs. Government social program costs have continuously and dramatically increased during the last three decades and cut-backs in these costs are well under way. Yet, development programs, such as SBA's 8(a) program, which have promise for significantly reducing the long-term needs for government social welfare expenditures, are not simultaneously being increased but are facing neglect and proposals for abolishment.

This report addresses selected minority business development solutions to this multifaceted problem. Other studies will be required on complementary subjects of development before a multifaceted solution can be structured.

OBJECTIVES OF THE REPORT

Mark Battle Associates, Inc., was commissioned to develop this report by Progress, Inc., and The Black Presidents' Roundtable Association of the Metropolitan Washington Area. The report was developed in response to requests by members of Congress and Administration policymakers for a definitive analysis of the 8(a) program and its importance as a component of a national minority enterprise development policy. Specifically, the objectives of this report are:

- To examine many of the alleged myths, with respect to the overall economic progress of minority Americans, that lead certain sectors of our society to believe that minorities have gained "enough"
- To provide balanced information for organizations, institutions and policymakers seeking to restructure business development programs designed to help minorities
- To examine the extent to which the continuation and expansion of minority business development programs are in the national interest--not just in the interest of minorities, but in the interest of all Americans
- To provide specific recommendations for cost-effective minority business development policies and programs, particularly the 8(a) program of the Small Business Administration

METHODOLOGY

The approach to this review of written materials was designed to answer two basic questions:

1. What are the current economic characteristics of minority Americans and minority businesses as compared with all Americans and all U.S. businesses?
2. What approaches to government minority business development policies and programs show promise for cost-effective contributions to the national interest?

Literature was reviewed and analyzed on the following subject areas:

U.S. business and economic trends; government policies and programs for minority business development; government expenditures for social welfare programs; and the economic progress of minorities. It should be noted that current and reliable data were inaccessible on many important characteristics on the status of minority enterprises and on selected economic characteristics of nonblack minority Americans. The scope of this report is therefore limited to the data available. A full bibliography is included as Appendix A.

Extensive formal and informal reviews of the draft findings, conclusions and recommendations were conducted. The draft report was disseminated by Progress, Inc., and The Black Presidents' Roundtable Association to a variety of individuals from the public and private sectors and authorities familiar with the problems of and development programs for minority businesses. Two formal reviews of the draft document were conducted, one by members of the two organizations which commissioned the

document, and one by nonmembers. Others reviewers submitted written or verbal comments. A list of reviewers is included in the acknowledgments. Many comments received were incorporated into the final document.

CONTENTS OF THE REPORT

This document contains four chapters. This Executive Summary includes Chapters I and II only. Chapter II is a summary of the findings and conclusions and a list of the recommendations.

The body of the report includes Chapters II through V and the appendices. Chapter III is a comparative analysis of the established, small and minority business sectors of the U.S. economy. Chapter IV is an assessment of SBA's 8(a) program, and Chapter V is a review of the economic progress of minority Americans. Appendix A is the bibliography; Appendix B is a selected list of minority inventors and innovators; and Appendix C includes selected government social expenditure patterns. Copies of the full report are available through Progress, Inc., or The Black Presidents' Roundtable Association.

CHAPTER II

FINDINGS, CONCLUSIONS AND RECOMMENDATIONS

This chapter presents a summary of the findings and conclusions in each of three areas: The Economic Progress of Minorities, Characteristics of Minority Business Enterprises; and the Characteristics of SBA's 8(a) Program. Recommendations are then provided for overall minority business development policies and programs as well as specific recommendations for improving the effectiveness of the 8(a) program.

THE ECONOMIC PROGRESS OF MINORITIES

These findings and conclusions specifically address the historical and future characteristics of minority employment, income and income supports.

Summary of Findings

- Social welfare expenditures under public programs have increased in cost from \$23 billion in 1950 to \$394 billion in 1978.¹ Of the latter figure, \$63 billion was the federal portion of the major need-tested benefit programs exclusively targeted to the poor.²
- Previous efforts to "lift all boats" on the rising tide of economic growth have illustrated that "the black boat does not float" proportionately with the larger society. The unemployment rate among black Americans decreased disproportionately with the overall unemployment rate during times of economic growth. During the economic growth period from 1975 to 1979, when the official nonminority unemployment rate decreased from 7.8 percent to 5.1 percent, or by 34.6 percent, the official black unemployment rate dropped from 13.9 percent to 11.3 percent or by only 18.7 percent.³

- The unofficial black unemployment rate has not been under 20 percent in the past five years (this rate includes those who want a job but no longer are actively seeking one as well as part-time workers who want full-time work). This rate has exceeded 25 percent during 1981.⁴
- The difference in the unemployment rates of minorities and nonminorities is not exclusively caused by racial discrimination but is caused by a combination of conditions including structural unemployment factors and cyclical unemployment factors as well as discriminatory practices.
- Large U.S. manufacturers which used to locate primarily in major metropolitan areas are increasingly relocating in remote areas⁵ (more than 200 miles away from major metropolitan areas). Contrary to popular belief, small businesses are the primary source of jobs for minorities⁶ and are the dominant creator of jobs in central cities. However, most small business start-ups (start-ups are the source of a high percentage of new jobs) are now in the suburbs as opposed to the central cities.⁷
- In contrast to nationwide patterns, preliminary 1980 census data indicate that black Americans are continuing to concentrate in the central cities of metropolitan areas.⁸ More than 14 million blacks out of a total of 26.5 million blacks now live in the central cities of major metropolitan areas, while six million others live in the suburbs and rural fringes of those areas.⁹
- The gap in the family income of blacks and whites is dramatic. During the 1960s the gap decreased; however, during the last decade, the gap increased significantly.¹⁰
- From 1970 to 1977 the median black family income as a percentage of the median white family income dropped from 61 percent to 57 percent.¹¹
- The unemployment rate of black and Hispanic youth (age 16-24) exceeds that of white youth. In 1977, the unemployment rates were as follows:¹²

Black youth	- 28.0%
Hispanic youth	- 12.6%
White youth	- 9.9%

- Inflation continues to disproportionately erode the purchasing power of minority families. While the real income of white families increased by four percent (from \$16,065 to \$16,740) between 1975 and 1977, the real income of black families declined by three percent from \$9,885 to \$9,563.¹³

Conclusions

- The continuing trends in the location decisions of major manufacturers as well as new trends in the location of new small businesses indicate that minorities are moving in one direction while the jobs are increasingly moving in another.
- These trends can only exacerbate minority unemployment rates already twice that of nonminorities. The results can leave minorities even more disproportionately unemployed in the future than they are today.
- The new supply-side economic policies are designed to hold down inflation and stimulate economic growth, resulting in increases in U.S. savings, investments, productivity and job creation. However, economic growth not deliberately targeted to minority businesses, minority communities and minority employment can leave minorities in conditions resembling a serious recession while the rest of the economy enjoys prosperity.

CHARACTERISTICS OF MINORITY BUSINESS ENTERPRISES

These findings and conclusions are specifically oriented to the overall impact of minority businesses on the U.S. economy and particularly on employment. For perspective, comparisons are selectively provided between minority business impacts and nonminority small business impacts.

Summary of Findings

- Small businesses throughout America (both minority and nonminority) are experiencing increased difficulty in providing the U.S. economy with the traditional stream of job creation, innovation, entrepreneurial creativity and competition required for continued

growth of the economy. The high cost of equity capital is perceived as one of the major problems.

- Minorities represent over 20 percent of the U.S. population.¹⁴ In 1977, minorities owned only five percent of U.S. businesses accounting for less than one percent of U.S. business receipts¹⁵ and providing jobs for approximately 0.8 percent of the labor force.¹⁶
- The total number of minority-owned firms increased by 30 percent from 1972 to 1977, from 367,000 to 481,000.¹⁷ The difference of 114,000 in six years represents an average of less than 20,000 new jobs created per year. In 1977, the average number of employees including the owner, remained unchanged at 1.9 per firm.¹⁸ Eighty-one percent of minority-owned firms had no paid employees.¹⁹
- In 1977, there were fewer than 3,500 minority businesses with more than 50 employees.²⁰
- Fast growth, small firms tend to be the most productive generators of new permanent jobs, and also tend to require substantial amounts of external financing.
- Inc. magazine's 1980 list of the 100 fastest growing small businesses in the U.S. included 42 firms that did not grow through acquisitions; these firms created 19,700 total jobs in five years for an average of 93 new jobs per year per firm.²¹
- Black Enterprise magazine annually lists the 100 largest black-owned firms in annual revenues. The change in the total number of employees of the firms on this list in 1972 compared with the 1980 list is 9,225.²² If the original BE 100 firms remained on the list in 1980, the hypothetical result would be an average of 10 new jobs per year per firm over a nine-year period.
- The fastest growing firms among the Black Enterprise 100 list for 1980 were the firms that sell black products to black people.²³
- Very few minority business success stories exist; the most successful are insignificant in the larger economy.²⁴
- Minority entrepreneurs and managers rarely have significant on-the-job experience in managing all but the smallest businesses.

- Minorities rarely have adequate access to capital.
- Minorities rarely have adequate access to government and private sector markets.
- Minority businesses have typically had an insignificant role in major urban revitalization and urban job creation efforts.

Conclusions

- Out of 46 million minority Americans, the total contribution to U.S. business receipts is less than one percent. Until minority business ownership is substantially increased, minorities will continue to be disproportionately dependent upon the public sector and the larger economy for jobs and income supports.
- Fast growing, young minority-owned firms are as good for the U.S. economy as their nonminority counterparts. In the long term, they could be even more valuable to the national interest; both contribute to the local and the federal tax bases, both provide jobs, innovations and competition. However, a higher percentage of minority-owned firms are likely to locate in minority communities and hire minorities who are disproportionately dependent on government social welfare expenditures.
- For minority Americans to truly participate in and significantly contribute to planned economic growth, more minorities must be allowed to and provided with incentives to become significant employers.
- Successful economic stimulation and job creation efforts in declining central cities require comprehensive plans and multiple party partnership with indigenous small and minority business participation.
- It is clearly in the national interest for large numbers of thriving new businesses to locate in minority communities.

CHARACTERISTICS OF SBA'S 8(a) PROGRAM

The 8(a) program is the Small Business Administration's development program, which provides a "sheltered" government procurement market

designed to help socially and economically disadvantaged business owners achieve "competitive viability." Socially and economically disadvantaged individuals include black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans and other minorities designated by SBA.

The Small Business Administration announced in May 1981, "The 8(a) procurement program is replete with problems and inequities. A major change in policy and program structures is necessary if the program is to serve disadvantaged, small firms. As it now stands, it is a program that benefits relatively few companies." At that time, the largest 50 firms in the program were listed as targets for immediate review for graduation. On April 30, 1981, legislation was introduced in the U.S. House of Representatives to abolish the 8(a) program. On June 30, 1981, proposed regulations were published by SBA that recommended maximum periods of participation in the 8(a) program of three to five years

Since 1969, when the 8(a) program began, approximately 4,600 have become 8(a) certified.²⁴ As of September 30, 1980, almost half of 2,138 firms were still active.²⁵ From 1969 to 1980, 525 firms voluntarily withdrew from the program, 1,374 were discontinued by SBA, 395 went out of business and 166 were graduated as competitive and self-sufficient businesses.²⁶

These findings and conclusions are specifically oriented to facilitating the "change in policy and program structures" currently being prepared by SBA.

Summary of Findings

- During the 12-year existence of the 8(a) program SBA helped award more than 27,000 contracts to 8(a)-certified firms totaling about \$5.5 billion.²⁷ Of this total, nearly half (48.5 percent) were awarded in two years, fiscal years 1979 and 1980.²⁸
- In 1979, all government contract awards to disadvantaged businesses (including non-8(a) contracts) amounted to \$4.2 billion or 3.3 percent of \$91.1 billion in total federal procurements.²⁹
- Federal government officials have reportedly discouraged numerous non-8(a) minority-owned firms from seeking government business due to wide-spread procurement practices in certain agencies that limit most contracts with minority firms to firms in the 8(a) program.
- "Viability" and "self-sufficiency" for 8(a) businesses have not been defined in a manner consistent with SBA's research on the definition of "mature" small businesses or with the requirements for "viability" in the open marketplace.
- Noted authorities indicate that SBA's size standards for all small businesses are unrealistically low.
- The difficulties have been widely disseminated but the notable accomplishments of the 8(a) program are not well known, are not understood and are not appreciated because the 8(a) story has not been conveyed to the public in a balanced way. Numerous studies have been conducted that highlight the positive and negative aspects of the program. The following positive factors are not widely known. The 8(a) program has been effective in:
 - Providing otherwise inaccessible management experience to thousands of minority-owned firms
 - Providing thousands of minority firms with access to an otherwise largely inaccessible government procurement marketplace
 - Providing track records for 8(a) firms
 - Helping many firms qualify for non-8(a) government and commercial work³⁰
 - Illustrating to many skeptical government officials that minority firms can perform effectively

- Providing a variety of types of satisfactory technical and financial assistance to participant firms³¹
- Helping thousands of firms increase sales and income³²
- Helping many firms resolve bonding problems³³
- Helping many firms improve credit capabilities³⁴
- Expanding the employment and skills mix of 8(a) firms

Conclusions

- The 8(a) program is clearly the most effective federal mechanism developed to date to increase the market share and viable participation of minority Americans in the U.S. economic mainstream.
- An effective 8(a) program can provide a cost-effective investment in the long-term reduction of government social welfare expenditures.
- From the very beginning of the 8(a) program until recently, there has been a paucity of reliable data on the actual conditions of and prospects for minority enterprise development, and a resulting pervasive disagreement among well-meaning policymakers regarding what are the best approaches to such development and which objectives will help foster that development if achieved.
- The goals and objectives of the 8(a) program have changed through the years and at this writing:
 - Are clearly stated but have not been clearly interpreted such that their achievement will result in solutions to the major problems facing the minority business community
 - Are not compatible with reasonable expectations for performance from the 8(a) program staff
 - Are not consistent with the historical approach to or the current plans for program admission, retention, termination or graduation

--Are not compatible with SBA's operational definitions of "socially disadvantaged," "economically disadvantaged," "competitive viability" or small business size standards

- An effective minority business development program is a critical component of any policy designed to stimulate economic activity in minority communities and can be an important component in a long-range plan to reduce the long-term demand for government social welfare expenditures.
- The proposal to limit the length of time for participation in the 8(a) program to a maximum of five years is designed to allow a larger number of firms to participate while keeping the total number of participants down to a level which the SBA staff can manage. Both objectives are quite reasonable on the surface. However, governmentwide efforts to channel the bulk of all minority business procurements through the 8(a) program are not realistic. Increasing the number of firms in the program by increasing the turnover rate of 8(a) firms can only be achieved at the expense of the quality of management participant firms can develop while in the program. Yet, the management experiences provided to 8(a) participants is perceived as one of its most important contributions to minority business development. Developing a small minority business cannot be rushed. 8(a) firms cannot be expected to achieve competitive viability in a three to five year period when convincing data shows that nonminority firms require 15 to 20 years to mature.
- The abrupt termination of the top fifty 8(a) firms prior to a realistic assessment of size standard or "competitive viability" defeats the objectives of the program and may permanently injure some of the minority business community's fastest growing companies.

RECOMMENDATIONS

Overall Minority Business Development Policy Recommendations

- Federal government policy should encourage the continued expansion of participation of all minority-owned firms in federal procurements by all federal departments and agencies.
- Federal government policy should specifically promote the utilization on non-8(a) minority-owned firms as legitimate government contracts.

- Government policies for stimulation of the economy should include carefully targeted and complementary programs specifically designed to stimulate the increasingly economically depressed minority communities. Specific objectives for achievement include:
 - Incentives (by way of contingent government grants or tax benefits) for long-term cooperation by city government leaders, large established businesses, trade associations, small businesses, minority businesses and community-based organizations.
 - Incentives for minority businesses to locate in minority neighborhoods, exclusive of urban enterprise zones
 - Educational activities and materials describing the benefits to each of the parties with whom partnerships are required for effective urban revitalization programs
- The federal government should allocate a greater percentage of its research and development funds to small businesses in general and minority businesses in particular to stimulate more successful high-technology small businesses which tend to result in fast-growth firms generating new permanent jobs at a high rate.
- The Technology Commercialization Program of the Minority Business Development Agency should be expanded to become a major focal point for minority business development.
- Urban enterprise zones legislation should be passed with emphasis on the critical role of indigenous small and minority enterprise participation in the early stages of planning and preparation. Special incentives should be provided for minority-owned firms to locate in urban enterprise zones.
- The importance of and the potential benefits to the national interest of a strong and healthy minority business community should be carefully articulated and widely disseminated to federal government officials and to the media.

- The Mergers and Acquisitions Program of the Minority Business Development Agency should be monitored as a potential focal point for minority business development.
- Minority business development policies should be developed and implemented in coordination with overall small business development policies, as well as with the overall government policies for the revival of the U.S. economy.

8(a) Program Restructuring Recommendations

- SBA size standards should be revised and indexed up or down to reflect a reasonable combination of the standards of the:
 - Heller Small Business Institute of The Wharton School, University of Pennsylvania (up to \$50 million in sales)³⁵
 - The National Association of Securities Dealers (up to \$50 million in market capitalization)³⁶
 - The 1977 SBA Task Force on Venture and Equity Capital For Small Business (up to \$60 million in sales and 15 to 20 years for "maturity")³⁷
- Tax incentives should to be implemented that encourage investments in small businesses in general and minority businesses in particular. Incentives are needed to begin to fill the gaps in the capital resources available to growing small firms.
- The criteria for graduation from the 8(a) program should be rational and obviously desirable for 8(a) firm managers to aggressively pursue. Under no circumstances should success be condemned. A two-tier program is recommended:
 - Tier One would function much like the existing 8(a) program with all Tier One participants being eligible for all forms of financial, technical and contract marketing assistance currently provided to 8(a) firms. Tier One firms should have a maximum of ten years to graduate to Tier Two. Existing 8(a) firms that have been in the program more than eight years but are ineligible for Tier Two should have a maximum

of three years and a minimum of two years to graduate to Tier Two.

- Tier Two firms should be limited to those firms passing the Tier One viability tests as described below. Tier Two firms should receive no "referral" 8(a) set-aside contracts from SBA but should be limited to self-marketing on contracts awarded because the firm convinced a federal agency of the quality of its track record and its ability to perform, just as "competitive" firms do. In those instances the contracts could be negotiated on a sole-source 8(a) basis, again, in a like manner to negotiated contracts by competitive firms. Additionally, when an agency is assessing the qualifications of more than one Tier Two firm, limited competition among Tier Two firms would be allowed. Depending on the industry, 8(a) firms should be given a negotiated maximum of not less than five years and not more than ten years participation in Tier Two at the discretion of SBA.

- The criteria for achieving "viability" should be defined by SBA in a manner which reflects the meaning of the term in the "subjective" private sector financial markets. If a firm cannot obtain the type of financing it needs at the stage of development it is in, it is not viable. The criteria should not be complicated. The following criteria are recommended:

- Profitability: A firm that cannot demonstrate an ability to make a profit cannot attract capital. Profitability has not been a major factor in 8(a) criteria. It is recommended that firms should not be allowed to ascend to the second tier until they have recorded a profit for two consecutive years, as reflected in certified financial statements.

- Sales: In order to become "competitive," 8(a) firms must demonstrate an ability to acquire non-8(a) sales. It is recommended that firms should not be allowed to ascend to the second tier until they have recorded a negotiated non-8(a) sales level of five to 25 percent of total sales (at the discretion of SBA) as reflected in certified financial statements.

Firms also should be ineligible for Tier Two until company sales have exceeded 50 percent of the "revised and realistic" size standards for two consecutive years.

--Access to Capital: The final stage of development in the maturity of a firm to the state of viability is the successful attraction of equity capital. Only providers of equity can fairly assess the potential of firms to acquire equity. It is recommended that all 8(a) firms in Tier Two be evaluated by any SBA-funded MESBIC or SBIC each year and informed of deficiencies which must be corrected and norms which must be achieved before equity capital would be a realistic possibility. Once a firm completes a public equity offering, it must be graduated from the program within six months.

- SBA should compile and widely disseminate to all government procurement offices, to the appropriate media and to all 8(a) firm participants, a document which clearly explains the program, its cost-effectiveness, its accomplishments and its present and future benefits to society.
- Termination from the program should not be based on a change in the "economic or social disadvantage" of the owner. This discourages the 8(a) entrepreneur from making profits, increasing personal net worth and a variety of other impractical expectations. The economic and social disadvantage should be the basis for initial eligibility only, not retention. Once in the program, the objective should be to allow the firm to become viable so that it can make the same types of contributions to the economy made by nonminority small businesses.

It is intended that the above findings, conclusions and recommendations can be the stimulus for extended discussion and analysis among minority business owners, and state, local and federal government policy-makers, as well as other interested parties.

CHAPTER II NOTES

1. Social Security Bulletin, Volume 43, Number 5, May 1980.
2. Vee Burke, Cash and Non-Cash Benefits for Persons with Limited Income: Eligibility Rules, Recipient and Expenditure Data, FY 1977-79, Report No. 81-44 EPW (Washington, D.C.: Congressional Research Services, February 12, 1981), pp. 5 and 7.
3. U.S. Department of Labor, Bureau of Labor Statistics.
4. The "unofficial unemployment rate" is a term developed by the National Urban League. It was originally called the hidden unemployment index. "The official definition of 'unemployed' excludes such 'hidden unemployed' as discouraged workers (i.e., those who want a job now but are no longer actively seeking) and the part-time workers who want full-time jobs." The National Urban League term incorporates both groups. (Data provided by the National Urban League Research Department in Washington, D.C., June 1981).
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BENEFITS OF MINORITY BUSINESS
ENTERPRISE
TO THE U.S. ECONOMY

PREPARED FOR:

THE BLACK PRESIDENTS' ROUNDTABLE ASSOCIATION
OF THE WASHINGTON METROPOLITAN AREA

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BENEFITS OF MINORITY BUSINESS ENTERPRISES
TO THE U.S. ECONOMY

Overview

Continued and expanded Federal support for minority business enterprises (MBEs) will result in tangible benefits for the nation as a whole. These benefits are:

- o Employment
- o Federal, State and local tax revenues
- o Sources of investment capital
- o Technological innovation and improvement
- o Support for development and expansion of non-minority business sectors
- o Fostering international trade relations
- o Delivery of social and voluntary services
- o Community support for self-sufficiency and "self-help"
- o Human capital development.

Federal MBE support programs, in particular the 8(a) and P.L. 95-507 programs, were initiated to counter the distorting effect on the marketplace of systemic discrimination. Such discrimination has continued to severely restrict MBE opportunities for growth and maturation. Thus, the need for these programs persists.

Policies for the 8(a) program recently promulgated by the Small Business Administration will limit the development of new MBEs and will have a devastating impact on those 8(a) certified firms that are moving toward maturity.

Support of MBEs by the Reagan administration is consistent with the principles of "supply-side" economics and will return quantifiable benefits to the economy. An unequivocal policy statement from the President supporting existing MBE Federal programs is urgently needed now, however, if these benefits are to be realized.

Minority Entrepreneurs as Employers

A 1979 study of small businesses confirmed the importance of small firms in developing new jobs. Two-thirds of the total employment growth of 5.6 million firms (representing 82 percent of private sector employment) came from small businesses.

Minority businesses represent an important sector of the small business community. Using the most recent census data available, analysts in the Department of Commerce have estimated that minority-owned businesses provide jobs to an estimated 1,081,095 persons.

- o This exceeds the total employment of the 19 largest U.S. oil companies;
- o It more than doubles the combined employment of the six largest U.S. steel manufacturers;
- o It is 80 percent greater than the total employment of the Ford Motor Company, Chrysler Corporation, and American Motors; and
- o It exceeds the combined work forces of ITT, IBM, Boeing, and Rockwell International.

A survey conducted in early 1981 among firms in the Washington metropolitan area, among which 8(a) firms are heavily represented, indicates employment among these MBEs greatly exceeds national averages. Estimated employment for the 250 firms represented by the sample shows a total of

14,234 employees. Many of these employees in professional, technical, and managerial categories would not find comparable positions in either the public or non-minority private sector if their jobs were terminated.

Employment among minority-owned enterprises has expanded as rapidly as in the non-minority sector.

- o Between the 1972 and 1977 census, total employment by minority entrepreneurs grew by a compound annual rate of 3.89 percent
- o The comparable growth rate for all private nonagricultural employment was 3.83 percent
- o Between 1977 and 1980 the number of jobs provided by minority-owned firms grew by an estimated 4.20 percent, which equalled the national average.

During the 1980s the importance of minority-owned businesses as employers will likely increase.

- o The Bureau of Labor Statistics (BLS) projects slower employment growth in the goods producing sectors through 1990
- o However, BLS also projects that employment demand in those retail non-goods producing areas in which minority-owned firms are concentrated will increase by as much as 8 percent
- o During the decade of the 1980s, total employment in the goods producing sector is projected to grow by 5 to 7 million persons, compared to about 20 million in the non-goods producing industries.

The contributions of MBEs as employers are made even more clear when the impact of these firms on unemployment is assessed. In 1980, an estimated 3.15 million persons were unemployed each week. If unemployment benefits of \$100 per week were paid to these persons, \$315 million a week would be required. The collapse of MBEs could represent an additional outlay of \$100 million in Federal unemployment benefits, since persons

employed by MBEs would not have easily found jobs in either the public or private sectors in 1980, a recession year. Put another way, the continued survival of MBEs in 1980 could have saved the Federal government \$100 million a week or \$5.2 billion for the year.

The implications of these data and projections are clear. Minority entrepreneurs will have to employ at expanded levels to offset weak and declining labor demand in the goods producing and public service sectors severely impacted by reductions in Federal spending.

Federal, State and Local Tax Revenues

A study of estimated Federal income tax payments made in 1977 indicated that \$2 billion had been recovered by the Federal government and another \$500 million had been paid in State, local, import, and excise taxes. (See Table attached.) Federal, State and local taxes paid by Washington metropolitan area firms alone were estimated at over \$93 million in 1981, a figure which represents a substantial contribution to the national and area economies.

Sources of Investment Capital

The U.S. Chamber of Commerce estimated in 1975 that every 100 new jobs created generated \$481,000 in additional bank deposits. A comparable estimate for 1981 is \$736,410. Using these figures, MBE employment in 1980 generated an estimated total bank deposits of nearly \$8 billion. If this sum was deposited in checking accounts only, the receiving banks could have leveraged loans in excess of \$72 billion. This sum would have been more than adequate to finance the \$72 billion in crude oil imported into the United States in 1980.

Technological Innovation and Improvement

The contributions of minority inventors and scientists to the nation's technological superiority over the centuries is little known but documented. Elijah McCoy, Lewis Latimer, and Granville T. Woods for example, patented major improvements in the railroad and electrical industries. Garret A. Morgan invented both the gas mask and the traffic light in the early 20th century.

The role of the small business sector, including minority small business, in technological innovation is more widely acknowledged. The National Science Foundation has found that between 1953 and 1973, small firms produced about four times as many innovations per research and development firms as medium-sized firms, and about 24 times as many as large firms.

Although minority participation in growth industries is still minimal, that which has occurred, according to a study conducted by the National Business League, is the direct result of minority inventiveness and creativity, i.e., the ability to "build a better mousetrap."

Robert C. Forney, Senior Vice President, E.I. De Pont de Nemours and Company, Inc., recently commented on the strong "we try harder" spirit among minority vendors with which his corporation does business. He noted that MBEs often compensate for what they may lack in the way of financial resources "with energetic attacks on bottlenecks."

Support for Development and Expansion of Non-Minority Business Sectors

Minority business enterprises are integrally tied into the national economy. They must of necessity turn to non-minority vendors for many of the goods and services that are required to sustain their operations.

For example, it is estimated that 250 Washington area firms recently sampled spend nearly \$25 million per year on space, nearly \$4 million on copy/duplicating machine rental, and over \$5.25 million on telephone costs.

As important, as MBEs develop and accumulate assets, they have demonstrated an interest and capability to diversify and commit resources to involvement in other business sectors. In the Washington metropolitan area, several cases can be cited of professional service consulting firms which have gained experience and business acumen through participation in the 8(a) program and which have become involved in community development projects as joint venture partners and investors.

Success of the Urban Enterprise Zone concept will depend on the availability of such partners in development, particularly in those cities where minorities predominate and are in political leadership positions.

Fostering International Trade Relationships

The U.S. trade deficit with Nigeria is \$13 billion, representing the value of Nigerian oil. Yet at the same time, American skills and technology are being sought by African countries for development. Many of these and other Third World nations have specifically expressed interest in doing business with MBEs.

Support for the increased involvement of MBEs in international trade will not only affect the balance of trade but will aid in establishing cooperative relationships with the suppliers of much needed raw materials. However, MBEs must be able to achieve a level of stability and sophistication that will enable them to pursue international markets with success.

Community Support for Self-Sufficiency and Self-Help

Since the emergence of Booker T. Washington on the national scene in the late 19th century, there has been a strong undercurrent of support for economic self-sufficiency and self-help in the black community. There has been a resurgence of that spirit with the development of visible minority business entities in the late 1960's and 1970's. An indication is the growing numbers of minority students in business administration courses and increasing numbers of firms seeking entry to the 8(a) program. However, the decline and/or disappearance of those businesses that have participated in the 8(a) and other minority support programs could result in a deeper sense of dependency and apathy in minority communities than currently exists. For there will be no convincing evidence that self-help in economic enterprise really works.

Delivery of Social and Voluntary Services

Jackie Robinson credited a neighborhood black businessman's interest and intervention for his rescue from the life of delinquency. The story could be repeated countless times. Minority entrepreneurs hire youth, advise students to go into business, support human rights and social service organizations, sponsor issue-oriented conferences, support recreation programs, and contribute to and manage political campaigns.

Cuts in public spending and the shift toward limited government places greater responsibility for social welfare programs on the private sector. If at the same time government decreases support for minority business enterprise, there will be fewer organizations within minority communities to pick up the slack.

Human Capital Development

Milton and Rose Friedman in Free to Choose have aptly described the importance of this benefit.

In countries like the United States the major productive resource is personal productive capacity --what economists call "human capital". . . . The accumulation of physical capital . . . has played an essential role in economic growth But the accumulation of human capital--in the form of increased knowledge and skills and improved health and longevity--has also played an essential role. . . . Both physical and human capital must be cared for and replaced. This is even more difficult and costly for human than for physical capital--a major reason why the return to human capital has risen so much more rapidly than the return to physical capital.

Human capital development is probably the least recognized contribution to the national economy made by minority business enterprises. The benefit is not solely to be understood in terms of numbers, although it is clear that the substantial majority of persons employed by MBEs are minorities and that small businesses are more labor intensive than large corporations.

The critical issue is the quality of the employment experience. Entrepreneurs start their businesses with themselves, and initially hire persons closest to them, i.e., other minorities. These persons are generally not experienced and would not be able to enter large corporations or Governmental agencies in comparable positions. As the company grows -- from the entrepreneurial stage to the manager state -- these employees grow with the company, thus gaining developmental experiences they would not be able to access otherwise. As important, they are able to gain such experiences despite the lack of credentials and formal evidence of capability (e.g. test scores) required by major corporations or public sector organizations for employment.

These individuals in turn, having acquired such managerial and program experience, make substantial contributions to their communities -- as church leaders, charity fund-raisers, political representatives and the like. In the case of MBEs, such contributions are overwhelmingly made to the minority communities from which the entrepreneurs come.

The Harmful Impact of SBA's 8(a) Policies

The nine benefits of minority business enterprises listed above represent assets to the national economy of incalculable value.

Policies recently promulgated by newly appointed SBA Administrator Michael Cardenas would have a devastating effect upon the ability of firms currently in the 8(a) program to generate these benefits. Major problems are:

1. SBA would terminate the participation of the largest 8(a) firms.

The 8(a) program was developed in recognition of the role that racial discrimination plays in interfering with market forces. A Republican Administration developed the program to compensate for this bias, which has not lessened to this day.

Firms operating with this "safety net" in place were then able to self-market with some assurance that they would not be denied a reasonable chance for success. Those entering the program in the earliest days have only recently begun to experience break-throughs. Thus, despite large contract dollar volumes, they have only recently experienced noticeable profitability.

Termination is arbitrary and unfair if based on cumulative contract dollar volume, without respect to the firm's comparative position relative to other small businesses, and in its own industry, or without assessing chances for success once the "safety net" has been removed. Imposition of

such a blanket policy without respect to individual circumstances will mean ruin for many. It will also eliminate any prospect of significant participation of such firms in community development ventures, in the international market place, in growth industries or in the private sector mainstream.

2. SBA would limit participation in the 8(a) program to 3-5 years

Such a policy flies in the face of substantial evidence accumulated by SBA itself that most firms do not approach maturity until they have been in existence 15 to 20 years. Most firms only begin to move from the entrepreneurial to the managerial stage of growth in 3 to 5 years. Few can show significant profits before the 5-year mark. Certainly the development of human capital required for mainstream participation is not accomplished in this time frame.

As important, Federal agencies will not be willing to entrust major long-term projects to SBA for the 8(a) program if the firms best qualified to implement them are no longer available. This would result in 8(a) subcontracts for minor projects with no development potential. This policy will also cause the demise of some of the program's most respected firms. Private sector opportunities are simply not available for them, particularly in the absence of enforcement of P.L. 95-507. Moreover, there has been no major change in the biases of evaluation panels which operate against minority firms when non-8(a) contracts are at stake. Thus, it is unlikely that these firms can maintain their current contract volume if they are removed from the 8(a) program.

There are alternatives for the management of the 8(a) program that would greatly limit the services SBA would have to provide to firms in the program over 3 years. These must be explored if the program is to remain credible and if the stated benefits to minority communities are to be

realized. Arbitrary time limitations established to make the 8(a) program a "revolving door" program for entrepreneurial orientation will not achieve the purpose of strengthening minority communities or the national economy.

3. SBA is penalizing 8(a) firms for its own management failures

In June 1981, 8(a) firms were advised by SBA that pending requirements and/or contracts earmarked for them could not be processed and approved because SBA had not yet met the Congressionally-mandated requirement that SBA negotiate with each firm by June 1 a fixed program participation term. Thus, firms were required to sign a statement which had the potential of depriving them of due process, a statement which is being challenged.

Firms have also been advised that 8(a) requirements and/or contracts cannot be approved because data submitted to one part of SBA (e.g., District Offices) had not been communicated to another part of the organization (e.g., Regional Offices). 8(a) contracts have also been withheld by Federal agencies because of the delays caused by SBA procedures and/or the inability of SBA to process more 8(a) contracts, including contracts which the 8(a) firms have marketed with no SBA assistance.

As a result of these events, 8(a) contracts anticipated to be awarded by the end of the third quarter (June 30, 1981) may be lost to the program forever. In addition, restrictions on the dollar volume of contracts let in the fourth quarter may affect the availability of 8(a) contracts to be let by September 30, 1981.

In short, 8(a) firms will lose business critical to their survival because of the inability of SBA to manage its work in an effective, efficient and timely manner.

The Need for a Statement from the President

The decline and disappearance of minority business enterprises is not in the national interest. However, the actions of SBA coupled with persistent reporting of the negative aspects of the 8(a) and other minority support programs suggest that such an outcome is intended. A statement from the President of the United States is urgently needed to reverse this trend, to continue support for MBE development and maturation, and to realize the substantial benefits that can accrue to the nation if minority entrepreneurs are viewed as important participants in the national economy.

Such a statement should include at a minimum:

1. Support for the continuation and expansion of the 8(a) program as an important vehicle for the involvement of MBEs in Federal contracting activities.
2. Commitment to enforce P.L. 95-507 as a means to foster majority/minority business arrangements within the private sector.
3. Recognition of the benefits to the national economy contributed by MBEs.
4. Insistence that SBA be held accountable for its contribution to the development and success of MBEs participating in its programs and will be expected to revamp its operations to achieve that end.
5. The Administration welcomes the participation of MBEs in the development of the Urban Enterprise Zone program and other initiatives designed to facilitate the nation's economic recovery.

ESTIMATED TAX PAYMENTS OF ALL MINORITY-OWNED BUSINESS ENTERPRISES
BY INDUSTRY AND TYPE OF TAX

IN 1977 DOLLARS
(Amounts in Thousands of Dollars)

Industry Group	Gross Receipts of All MBEs 1/	Est. Fed. Income Tax Rate 2/	Est. Fed. Income Tax Payments 3/	Est. State Local, Import & Excise Tax Rate 4/	Est. Payments of State, Local, Import & Excise Taxes 5/	Est. Total Tax Payments By MBEs 6/
Agriculture, Forestry & Fisheries	—	10.66	—	3.04	—	—
Mining	—	33.76	—	3.55	—	—
Construction	2,360,764	3.91	82,863	1.90	44,855	127,716
Manufacturing	1,959,424	5.77	113,059	2.14	41,952	154,991
Transportation and Utilities	1,060,422	4.35	46,128	3.61	38,281	84,409
Wholesale Trade	2,030,700	3.00	60,921	0.90	18,276	79,197
Retail Trade	10,629,378	2.85	302,937	1.96	208,336	511,273
Finance, Insurance and Real Estate	1,333,639	18.77	250,324	2.37	51,607	281,931
Services	6,201,552	16.79	1,041,241	2.21	137,054	1,178,295
Industries not Classified	458,100	21.67	99,270	—	—	99,270
TOTAL TAX PAYMENTS (Estimated)			1,996,743		520,341	2,517,084

1/ Bureau of the Census, 1977 Survey of Minority-Owned Business Enterprises

2/ Based upon Table 1 which is in turn based upon the tax record of sole proprietorships. This form of business organization accounts for about 75 percent of all MBEs.

3/ Gross receipts times estimated Federal income tax rate.

4/ Dun & Bradstreet, The Cost of Doing Business: Proprietorships, 1977. Based on Gross Receipts.

5/ Gross receipts times estimate consolidated tax rate for state, local, import and excise taxes.

6/ Sum of estimate Federal income taxes paid plus estimated state, local, import and excise tax payment.

NOTE: 1977 is the latest year for which complete data is available.



August 19, 1982

New York

NAACP
Black
Business
Advocacy
Program

NAACP MINORITY BUSINESS DEVELOPMENT INITIATIVES

The NAACP firmly believes that permanent economic gains made by Black people in this country will come about as a result of our sharing in the free enterprise system as business owners. We believe that equitable employment opportunity is a right to be shared by all Americans. Historical and current data tell us, however, that this right cannot be exercised without the benefit of greater business ownership and success, and without the ability of Black businesses to compete on an equal basis within the national and international marketplace. The social, physical, environmental and educational problems of the minority community are an integral part of the problems of the cities and states of this nation. They are exemplified through the high cost of welfare, unemployment and law enforcement in the economically disadvantaged urban areas, in which a high percentage of minorities reside. These problems are but a reflection of the depressed figures on the "bottom line" of minority businesses.

These national problems will be reduced in direct ratio to increased strength and capitalization of minority businesses. While re-investing in their own growth and development, minority businesses will generate monies into the minority community toward its growth and development. It is critical to the improvement of the national economy and to a resolution of some of the nation's most serious problems, that existing Black owned businesses be developed to their fullest capacities, and that new minority-owned ventures be encouraged and brought to fruition as rapidly as possible. Black business leaders must be given an opportunity to create a path to economic parity within Black communities if we are to believe in the free enterprise system.

1. Minority Business - A National Priority

The Reagan Administration should establish Minority Business Development as a priority. Its policies and programs throughout all federal agencies should clearly specify and dictate increased goals for minority business opportunity. These policies and goals must result in an increased share of federal procurements. Governmental action that may impact Minority Business Development should be assessed to determine if such action is consistent with Minority Business Development as a priority.

2. Subcontracting Compliance

Federal Government Prime Contractors must be made to adhere to the law as stipulated in Section 211 of Public Law 95-507 as regards subcontracting with small and minority-owned small businesses. The Reagan Administration should enforce this law to the fullest. If Federal Prime

Contractors adhere to the subcontracting provision as outlined in Public Law 95-507, Government spending should correlate with increased hiring by minority businesses. Governmental action must be taken to alleviate state and local government inequitable procurement practices (including contracts and grants) which also weaken the intended purpose of Public Law 95-507. Remedial measures for such disparate treatment of minority businesses must be addressed via firm executive orders or legislative enactments.

3. A Strengthened and Expanded 8(a) Program

The Small Business Administration 8(a) program has been the cornerstone of the Federal Government's Minority Business Development Programs during the past decade. It has been successful in developing a number of "government prime contractors" within the ranks of minority businesses. This has been a historical achievement. In keeping with the Reagan Administration's philosophy of developing and emphasizing the private sector, the 8(a) program becomes most critical to minority business. Accordingly, the 8(a) program should be strengthened and expanded in all areas.

4. Greater Access to Capital and Credit

Lack of access to equity capital and credit has historically been a key barrier for minority businesses. The financial community and the Federal Government should establish a joint program to address this problem and make adequate capital and credit available. This is an immediate necessity if minorities are to participate in an economic system as business owners, who will rely less on direct government support.

5. Minority Firms - Under Utilized Suppliers

The private sector that sells to minorities as consumers must buy from minorities as suppliers. This has not happened to any significant extent despite federal government "jawboning" during recent years. The NAACP considers it an obligation for major corporations to buy from minority businesses. The NAACP intends to use its power to withhold economic support of its constituents from major corporations that are least actively procuring goods and services from minority businesses.

6. Development of Large Minority Business Enterprises

The Small Business Administration must abandon its policy of terminating the participation of larger minority firms in the 8(a) procurement and assistance program. The federal government should focus its resources toward the development of a critical mass of larger, fast growing minority companies. Such firms contribute to the economic well being of the nation and have a direct impact on the economic development of minority communities.

7. Provide Incentives for High-Technology Minority-Owned Firms to Locate in Minority Communities

Facilitate the development of well-planned, controlled business environments such as industrial parks and employment centers in low-income areas (exclusive of Enterprise Zones) which effectively reduce the costs and the risks of doing business in those areas.

8. Establishment of a Non-8(a) Minority Business Set Aside

There are many minority firms that are desirous of government business but for various reasons do not meet the eligibility requirements for 8(a) certification. An additional number of minority firms who could meet the eligibility requirements are denied access to the 8(a) program because of the apparent limitation of the current 8(a) portfolio to approximately 2000 firms. The establishment of a competitive minority small business set-aside program would be considered a major initiative in the furtherance of minority business development.

INITIATIVE # 1Minority Business - A National Priority

The Reagan Administration should establish Minority Business Development as a priority. Its policies and programs throughout all federal agencies should clearly specify and dictate increased goals for minority business opportunity. These policies and goals must result in an increased share of federal procurements. Governmental action that may impact Minority Business Development should be assessed to determine if such action is consistent with Minority Business Development as a priority.

Background

While other sectors of the American business community rise and fall with the changing conditions of the U.S. economy, minority business enterprise has been in a constant state of depression. The minority business community has been plagued by structural underdevelopment which has been sustained by a lack of access to capital, credit, effective technical assistance and an equitable share of public and private markets. Results of a recent poll of twenty-four Black companies based in the Washington, D.C. metropolitan area revealed that the average number of employees laid off by each company since January 1981 was twenty-six; half of the companies have lost one-third of their work-forces or more and thirty percent of the firms suffered a fifty percent reduction in their dollar volume of Federal 8(a) contracts.

The impact of this situation is felt most keenly by Blacks as well as other minorities in America which have had to face high unemployment and massive budget cuts in Federal human services programs. In addition to the absence of a strong, job creating minority business sector, minority communities have also been crippled by corporate disinvestment and an exodus of majority owned companies. Large manufacturers have relocated plants out of center cities and away from areas

where most of America's Black population is concentrated. Similarly, most majority owned "start up" small businesses, which are a major source of job creation, are located in the suburbs.

It is in the national interest of the United States that the Federal government take a leading role in fostering minority business development. A strong community of well developed minority businesses can provide thousands of jobs, contribute to Federal, state and local tax bases and be a source of investment capital. Funds committed to support minority business enterprise development are only a small fraction of the expenditures for Federal domestic programs. A viable minority business sector has the potential for reducing the long term need for several Federally funded social services programs.

Minority business enterprise development must be among the president's highest priorities. The president should make each agency head responsible for executing a policy of constructive intervention to break the patterns of structural underdevelopment. The 8(a) contract procurement and business assistance program administered by the Small Business Administration and other Federal programs designed to foster the advancement of minority business enterprise should be accelerated to the fullest extent to support the development of numerous, viable and fast growing minority business enterprises. The Federal government should provide minority entrepreneurs with inducements and incentives to start new businesses. The full weight of the government should be employed to compel large prime contractors to expand their subcontracting transactions with minority companies. An effective, coordinated policy well executed by the president and executive agencies can bring the minority business community into full partnership within the business and corporate sector of America.

INITIATIVE # 2Subcontracting Compliance

Federal government prime contractors must be made to adhere to the law as stipulated in Section 211 of Public Law 95-507 as regards subcontracting with small and minority-owned small businesses. The Reagan Administration should enforce this law to the fullest. If federal prime contractors adhere to the subcontracting provision as outlined in Public Law 95-507, government spending should correlate with increased hiring by minority businesses. Governmental action must be taken to alleviate state and local government inequitable procurement practices (including contracts and grants) which also weaken the intended purpose of Public Law 95-507. Remedial measures for such disparate treatment of minority businesses must be addressed via firm executive orders or legislative enactments.

Background

During the past year we have observed a significant increase in the number of federal prime contractors that have been found to be in some manner of non-compliance with legislative subcontracting requirements under Section 211 of Public Law 95-507. The law requires submission and execution of plans by prime contractors for utilization of small businesses and small business concerns owned and controlled by socially and economically disadvantaged individuals.

Total federal procurement in FY 1981 was \$108.1 billion. Forty-five billion dollars of this total was subcontracted out by prime contractors. Minority firms reportedly received \$910 million or 2 percent of the \$45 billion in subcontracting. This two percent is probably overstated because the \$910 million figure represents in part, dollars which prime contractors estimated they would spend with minority subcontractors, not total dollars actually spent.

In view of the emphasis of the Reagan Administration on decreased dependence of minority businesses on federal contracts, we feel such subcontracting opportunity

is clearly consistent with this objective. The opportunity for a minority concern to subcontract with a prime is seen as a vital first step to decreasing that concern's dependence on federal requirements as well as to facilitate its transition to performance within the private sector. It has also been demonstrated that prime contractors experience savings as high as 38 percent through the use of small business sub-contractors. The requirements of public law, the incentive of savings to government and increased minority business partnership with the private sector are three compelling reasons for more effective administration of the subcontracting program. As an important step we recommend that the SBA implement procedures for effective coordination between its minority business development program and the subcontracting office of the SBA.

INITIATIVE # 3A Strengthened and Expanded 8(a) Program

The Small Business Administration 8(a) program has been the cornerstone of the Federal Government's Minority Business Development Program during the past decade. It has been successful in developing a number of "government prime contractors" within the ranks of minority businesses. This has been a historical achievement. In keeping with the Reagan Administration's philosophy of developing and emphasizing the private sector, the 8(a) program becomes most critical to minority business. Accordingly, the 8(a) program should be strengthened and expanded in all areas.

Background

The 8(a) set aside program of the U.S. Small Business Administration for over a decade, has been the principal government vehicle for assisting the development of minority business opportunity. Under this program federal agencies "set aside" selected procurements for the SBA as the prime contractor. The SBA, in turn, subcontracts the procurements to 8(a) companies who have qualified as being socially and economically disadvantaged. At present there are approximately two thousand companies in the 8(a) portfolio of the SBA.

An overview of the FY 1981 MBE procurement will put the 8(a) program in clearer perspective. According to the SBA, federal procurements in FY 1981 totaled \$108.1 billion. During the same period 8(a) direct procurements totaled \$1.74 billion or 1.6 percent. Non-8(a) MBE direct procurements totaled \$1.44 billion or 1.3 percent. Total 8(a) and non-8(a) MBE procurement was \$3.18 billion or 2.9 percent of total federal direct procurements. If we include the reported \$910.5 million or 2.0 MBE percent of \$45 billion in subcontracting by federal prime contractors, the total MBE procurement for FY 1981 was \$4.09 billion or 3.7 percent of total federal procurement.

Administration of the program over the years has fallen far short of the level and quality of effort necessary for the development of companies in the 8(a) portfolio to a level of maturity that provides maximum assurance for their successful continuation as corporate entities in the general marketplace. Continuing dialogue between the minority business community and officials of the Small Business Administration since the inception of the 8(a) program has not resulted in the quality of program administration we consider necessary for effective program implementation.

The passage of P.L. 95-507 in October 1978 provided a statutory basis for SBA to provide "maximum practicable opportunity for the development (emphasis added) of small business concerns owned by members of socially and economically disadvantaged groups." P.L. 95-507 provides SBA with an array of program tools for fostering minority business development. Unfortunately, SBA has not applied sufficient management initiative to aggressively implement the Congressional mandate.

There are several key problem areas in the administration of the 8(a) program which if corrected will greatly improve the prospects for effective development of firms in the 8(a) portfolio. Among these are (1) lack of clear policy guidelines for program certification, continuation and completion based on quantifiable and economically defensible criteria; (2) the lack of program staff who have sufficient experience and working knowledge of "real world" business practices and problems; (3) an insufficient level of funding to adequately staff the various elements of the 8(a) program; (4) a definite weakness in SBA's advocacy of minority business development; and (5) an inadequate perception by SBA of the need to differentiate the service requirements of 8(a) firms at varying levels of their development within the programs.

INITIATIVE # 4Greater Access to Capital and Credit

Lack of access to equity, capital and credit has historically been a key barrier for minority businesses. The financial community and the Federal Government should establish a joint program to address this problem and make adequate capital and credit available. This is an immediate necessity if minorities are to participate in an economic system as business owners, who will rely less on direct government support.

Background

A May 1978 report of the National Association of Securities Dealers (NASD) cited the difficulties small businesses have in generating equity capital to support their growth. The report states in part:

"...the longer a firm is in business, the more successful it is, and the larger its equity base, the easier it is for it to fill its financing needs from its own earnings, by selling additional equity or by borrowing. As a result, those that need capital the most, i.e., smaller companies in the early stages of development, experience the greatest difficulty in obtaining it. Because they are incapable of generating the capital needed to support their growth potential, small developing companies are forced to obtain outside assistance."¹

No programs to help minority owned businesses can succeed, unless those programs take into consideration the lack of accessibility to short and long term equity capital and credit markets, experienced by minority owned companies. Minority business enterprises (MBEs) are a vital and growing component of the U.S. economy. Our contribution to

¹ National Association of Securities Dealers, Inc., Report of the Joint Industry/Government Committee on Small Business Financing—The Current Environment and Suggestions for Improvement, May 22, 1978, p.8.

the overall performance of the economy is dramatically illustrated in the number of jobs we provide, the level of investment capital we generate for the nation's banking system, and in the tax revenues we generate. Ironically, our limited access to capital and credit does not reflect our contributions to the financial community.

The Chamber of Commerce of the United States has estimated that every 100 new jobs created in the economy generates \$481,000 in additional bank deposits.¹ Since the estimate was in 1975 dollars, the comparable figure for 1981 was \$736,410.² Applying this amount to the estimated MBE employment of 1,061,045 in 1980 yields estimated bank deposits of \$7.961 billion.

According to the Banking Section of the Research and Statistics Division, Federal Reserve Board (April 23, 1981) the average member bank reserve requirement for demand deposits was slightly above 11 percent. The average reserve requirement on the time and saving deposits of banks was about 2.3 percent. This means that if all of the estimated \$7.961 billion in MBE generated bank deposits were deposited in checking accounts, the receiving banks could have made loans amounting to \$72.373 billion. This would have been more than adequate to finance the \$72.0 billion³ in crude oil imported into the United States in 1980.

However, had the entire \$7.961 billion been deposited in savings accounts, loans of \$346,130 billion would have been possible. This amount

¹Chamber of Commerce of the United States, What New Jobs Mean To A Community, 1975.

²Calculated by inflating \$481,000 by the percent change in the CPI between 1977 and March 1981.

³Department of Energy, Energy Information Administration, Energy Data Operations, Office of Oil and Gas Statistics, Petroleum Marketing and Pricing Statistics Division, April 23, 1981.

is more than sufficient to finance the purchase of 100 percent of the assets of the 14 largest U.S. industrial corporations. That group includes the 9 largest oil companies, the 2 largest automobile manufacturers, IBM, General Electric and ITT.

INITIATIVE # 5Minority Firms: Under Utilized Suppliers

The private sector that sells to minorities as consumers must buy from minorities as suppliers. This has not happened to any significant extent despite federal government "jawtoring" during recent years. The NAACP considers it an obligation for major corporations to buy from minority businesses. The NAACP intends to use its power to withhold economic support of its constituents from major corporations that are least actively procuring goods and services from minority businesses.

Background

Black consumers purchase well over \$100 billion worth of goods and services from non-minority corporate America. However, non-minority corporate purchases of goods and services from Black firms represent less than one-percent of this amount. These purchasing practices of non-minority corporations are responsible in great part for the disproportionate reliance by the minority business sector on contract opportunity generated by government procurements. These practices will not change until the attention of the majority business community is focused realistically on the relationship of minority consumer dollars to minority contract opportunity.

The purchasing practices of fifty major corporations will be examined and communicated to NAACP constituents throughout the nation. The selected companies will also be examined to determine their compliance with the minority subcontracting requirements of government procurement policies. The NAACP intends to use its power to withhold the economic support of its constituents from those companies that are found to be least actively procuring goods and services from minority businesses.

INITIATIVE # 6Development of Large Minority Business Enterprises

The Small Business Administration must abandon its policy of terminating the participation of larger minority firms in the 8(a) procurement and assistance program. The federal government should focus its resources toward the development of a critical mass of larger, fast growing minority companies. Such firms contribute to the economic well being of the nation and have a direct impact on the economic development of minority communities.

Background

At present, the Small Business Administration (SBA) is pursuing a policy of terminating the largest minority companies from participation in the 8(a) portfolio. Many of these firms employ hundreds of people and demonstrate excellent potential for growth and diversification. The SBA policy of terminating participation of these firms in the 8(a) program runs directly counter to the interests of the nation as a whole and its minority communities in particular. The impact of this action for most affected companies will be negative growth, and massive employee lay-offs. Some firms will fail. The majority of the laid-off employees will be minorities adding to the disproportionately high minority unemployment rolls.

The development of large, viable and fast growing minority business enterprises is in the best interests of the general economy. Such firms are an essential component to the economic development of minority communities. Therefore, the minority business development resources of the Federal government should be marshalled to foster the establishment of a critical mass of large minority firms in a variety of areas of business enterprise. As the society struggles through this period of economic recession, all of the nation's resources must be brought

to bear on the goal of economic recovery. Minority firms not only add to the total sum of national economic well being; they have a direct impact on the development of minority communities since they tend to locate their facilities in proximity to large minority population centers. Many tangible benefits accrue to the society from large minority business enterprises. Some of these benefits are as follows:

Employment - Small businesses create most of the new jobs in the U.S.. According to the U.S. Department of Commerce figures, minority-owned businesses provided jobs to an estimated 1,081,095 persons in 1977. That figure is greater than the employment of the 19 largest U.S. oil companies and it exceeds the employment rolls of the four largest automobile manufacturers.

Federal, state and local tax revenues - Minority firms paid an estimated \$2 billion in Federal taxes in 1977 and about \$500 million in state, local, import and excise taxes.

Sources of Investment Capital - The U.S. Chamber of Commerce estimated in 1981 that every 100 new jobs generated \$736,410 in additional bank deposits. Using this estimate, minority businesses generated estimated bank deposits of approximately \$8 billion.

Technological Innovation and Improvement - The contributions of minority inventors and scientists to the nation's technological superiority over the centuries is little known but documented. Elijah McCoy, Lewis Latimer, and Granville T. Woods for example, patented major improvements in the railroad and electrical industries. Garret A. Morgan invented both the gas mask and the traffic light in the early 20th century.

Support of Non-Minority Business Sector - About 250 Washington area firms spent nearly \$25 million per year on office rental, about \$4 million on copy/duplication machine rental and over \$5.25 in telephone costs.

Human Capital Development - Minority firms provide their minority employees with technical, professional and managerial experience they would not otherwise receive in other sectors of the business community or in governmental agencies.

Other contributions of large minority business to the society include research and development; the creation of proprietary products and the letting of contracts to smaller firms. Executives of large minority businesses are often leaders in the community and role models to young people.

INITIATIVE # 7Provide Incentives for High-Technology Minority-Owned
Firms to Locate in Minority Communities

Facilitate the development of well-planned, controlled business environments such as industrial parks and employment centers in low-income areas (exclusive of Enterprise Zones) which effectively reduce the costs and the risks of doing business in those areas.

Background

The reasons for this initiative are very compelling. It is quite tempting in this recessionary environment to blame the dismally high minority unemployment rates on cyclical factors which are expected to correct themselves when the entire economy recovers. The facts are overwhelming, however, that the huge numbers of unemployed minority Americans, particularly unemployed Black Americans concentrated in our central cities, are emerging as a permanent dependent sector of our national population which is increasingly desperate for sources of self-sufficiency. We need no innovation in this society to design the model source of self-sufficiency—that model is the small business.

Historical trends indicate that a strong economic recovery will only marginally help minorities. During the economic growth period from 1975 to 1979, when the official non-minority unemployment rate decreased from 7.8 percent to 5.1 percent, or by 34.6 percent, the official Black unemployment rate dropped from 13.9 percent to 11.3 percent or by only 18.7 percent. The current rate of non-white unemployment is 16.3 percent compared to 8.5 percent for whites.

More significantly, however, the unofficial Black unemployment rate has not been under 20 percent in the past five years (this rate includes those who want a job but no longer are actively seeking one as well as part-time workers who want full-time work.) This rate currently exceeds 29 percent.

Historical trends further suggest that the problem of minority unemployment is likely to be even more severe in the future than it has been in the past. Not only has the size of the government labor force been contracting, but trends in the location decisions of large manufacturers as well as small business suggest that the jobs are going in one direction and minorities are going in another.

- o Large U.S. manufacturers which used to locate primarily in major metropolitan areas are increasingly relocating in remote areas (more than 200 miles away from major metropolitan areas). Contrary to popular belief, small businesses are the primary source of jobs for minorities and are the dominant creator of jobs in central cities. However, most small business start-ups (start-ups are the source of a high percentage of new jobs) are now in the suburbs as opposed to the central cities.
- o In contrast to nationwide patterns, preliminary 1980 census data indicate that Black Americans are continuing to concentrate in the central cities of metropolitan areas. More than 14 million Blacks out of a total of 26.5 million Blacks now live in the central cities of major metropolitan areas, while six million others live in the suburbs and rural fringes of those areas.

As programs providing relief to the dependent are decreased, and the size of the dependent population increases, the need for simultaneous programs of development targeted to that population becomes clear.

There is still an unfortunate lack of adequate data describing the current and historical condition of minority businesses. However, available data indicate that minority-owned firms provide jobs for more than one-half of one percent of the labor force, yet minority Americans account for more than 20 percent of the population. In 1977, nearly 3,500 minority owned firms employed more than 50 employees. These figures represent an important opportunity for minority business development policy, for the underutilized capacity in the minority business community represents a tremendous frontier of development, an underutilized source of job creation, innovation, entrepreneurial creativity and competition in an economy facing massive needs for economic stimulation in the central cities.

Federal government policies seriously need to reflect an appreciation for the importance of the interlocking linkages between recovery of the U.S. economy revitalization of economically depressed areas of our central cities, high minority unemployment rates and minority business development programs.

INITIATIVE # 8Establishment of a Non-8(a) Minority Business Set Aside

There are many minority firms that are desirous of government business but for various reasons do not meet the eligibility requirements for 8(a) certification. An additional number of minority firms who could meet the eligibility requirements are denied access to the 8(a) program because of the apparent limitation of the current 8(a) portfolio to approximately 2000 firms. The establishment of a competitive minority small business set-aside program would be considered a major initiative in the furtherance of minority business development.

Background

Federal agencies have failed to establish small business set aside programs for minority firms that are not 8(a) certified. Many non-8(a) minority firms are small businesses that have limited their operations to the private sector and often do not require the full range of services available to the 8(a) firms. However, they do require special assistance in overcoming constraints in the marketplace which result from their minority status. These companies know very clearly that government contract opportunity has historically been an important vehicle for the development and growth of small businesses. They also recognize that it should not be necessary for them to become 8(a) certified in order to participate in federal contracting opportunities. A substantial set-aside program for non-8(a) firms would assist greatly the efforts of such firms to access government contract opportunities and expand their markets in the private sector.

A set-aside program for non-8(a) minority firms is also vitally needed as a bridge to the general marketplace for firms that complete the 8(a) program. Legislators and government administrators frequently overlook the fact that the purpose of the 8(a) program is business development. The need for providing post-program support to firms that may be ready to move beyond the 8(a) program has not been

addressed adequately, nor has this need been given serious consideration as a crucial factor in the survival and maturation of companies developed within the 8(a) program.

Approximately 2000 minority firms are currently certified to participate in contract opportunity generated by the 8(a) set aside program of the U.S. Small Business Administration. While the use of certified firms must be strengthened and expanded, other minority firms that do not participate in the 8(a) program should also be used. However, federal agencies have tended to look primarily to 8(a) firms in meeting their minority contract requirements. This has severely limited federal contracting opportunity for thousands of non-8(a) minority firms. There are two important reasons for this limitation.

- (1) 8(a) contracts are much quicker to process and enable agency program managers to meet their procurement requirements in a more timely manner.
- (2) Federal agencies have made heavy use of 8(a) firms in their efforts to meet their MBE goals.

The establishment of a competitive minority small business set-aside program would be considered a major initiative in the furtherance of minority business development.

TESTIMONY BY

LAWYER A. MARTIN

on behalf of the

BLACK PRESIDENTS' ROUNDTABLE

before the

ADVISORY COMMITTEE ON SMALL
AND MINORITY BUSINESS OWNERSHIP

April 30, 1982

Mr. Chairman, minority business and trade associations across the country are deeply interested in your committee's efforts to make the Small Business Administration more responsive to the needs of the small business and minority small business sectors of our economy.

We agree with your objectives of decreasing the dependence of minority business on disproportionately high levels of federal contract support and we also agree with your objective of increasing minority business development and growth through partnership with the private sector. However, we are certain that your objectives will not be achieved without constructive critical assessment of the role of the Small Business Administration in fostering the development and growth of minority business. We trust that the following areas of concern and accompanying recommendations will be accepted in that light and will facilitate your consideration of the SBA mission as it undergoes a change in leadership.

1. Slowness in Clearing Agency Offerings and Financial Assistance Through The National Office of SBA. An historically important incentive for procurement officials to utilize the 8(a) program has been the comparative quickness in obtaining contractors to perform on the requirements of their agencies. This is because agency offerings for performance by 8(a) concerns can be finalized more quickly than formerly advertised.

Mr. Chairman, my name is Lawyer A. Martin, President of Evaluation Technologies Incorporated, an Arlington, Virginia-based professional and technical services firm specializing in computer software support services; facilities management; training and training materials development; and information support services.

I am here today in my capacity as Treasurer of the Black Presidents' Roundtable (BPR). The Black Presidents' Roundtable is an organization of the Presidents of over two hundred firms in the greater metropolitan Washington area. Our companies are diverse in nature with capabilities that include professional services, manufacturing, retail, architecture and engineering, financial management, communications, research and development, construction, and public affairs.

The Black Presidents' Roundtable welcomes this opportunity to share with the Advisory Committee its views on several areas of SBA responsibility which impact its minority business clientele. These views are among a number of policy recommendations concerning minority business development which BPRA has communicated previously to the Executive Branch and agencies of the Federal Government.

Requirements. During the past year, there has been a marked increase in the time required for agencies to clear their offerings and for 8(a) concerns to clear requests for financial assistance through the Small Business Administration. This has resulted in a dis-incentive for agency utilization of 8(a) concerns. This has also seriously damaged the development of these concerns through loss of contracts and in many cases such delay has resulted in costly loss of time in the achievement of agency missions.

We are aware that as recently as April 28, 1982, the new SBA Director, James C. Sanders, announced new rules governing the 8(a) program which, if effectively implemented by Regional and District SBA Office, should remedy this concern.

2. More Creative and Effective Utilization of the 7j Provisions. It is universally agreed that technical assistance is the key element in the development of business enterprise. The 7j program of the Small Business Administration was legislated to

provide technical assistance to small businesses and assist them in the acquisition of equipment vital to the performance of their contracts with agencies of the Federal Government. It is our view that the SBA has not been creative enough with its utilization of 7j contractors as an extension of the SBA staff. This would enable the SBA to, in effect, get a bigger bang for its bucks and increase the quality and effectiveness of its management of the 8(a) portfolio. Additionally, we feel that the SBA should place greater emphasis on the use of its contractors for providing marketing assistance within federal agencies on behalf of its minority business clientele. Further, the approval for acquisition of equipment through the Business Development Expense (BDE) program element of 7j has, in the past, often been delayed by requirement for clearance by the national office. The recent action of Mr. Sanders should remedy this problem also.

3. More Effective Administration and Coordination of Subcontracting Requirements.

During the past year we have observed a significant increase in the number of federal prime contractors that have been found to be in some manner of noncompliance with legislated requirements for submission of plans for utilization of minority small business contractors. In view of the emphasis of the administration and the SBA on decreased dependence of minority businesses on federal contracts we feel such subcontracting opportunity is clearly consistent with this objective. The opportunity for a minority concern to subcontract with a prime is seen as a vital first step in decreasing that concern's dependence on federal requirements and facilitates its transition to performance within the private sector. It has also been demonstrated that prime contractors experience savings as high as 38 percent through the use of small business subcontractors. The requirements of public law, the incentive of savings to the government, and increased minority business partnership with the private sector, are three compelling reasons for more effective administration of the

subcontracting program. As an important step we recommend that the SBA implement procedures for effective coordination between its minority business development program and the subcontracting office of the agency.

4. Development and Effective Utilization of Management Information Systems. A serious deterrent to the administration and cost-effective management of SBA programs has been the lack of adequately structured management information systems (MIS). This is especially true with regard to programs designed to foster minority business development. The lack of adequate MIS capability makes it virtually impossible to determine what point 8(a) concerns have reached in the implementation of their business development plans, without the time consuming and costly manual review of agency files. The lack of adequate MIS capability also reduces the SBA's ability to quickly match offerings with qualified portfolio firms, thus contributing to the slowness in meeting the procurement requirements of federal agencies. We also note that improved MIS capability would greatly increase the SBA's effectiveness by maintaining a data base on prime contract awards for use in quickly matching prime contractors with potential minority subcontractors. We are aware that the SBA has made some efforts to utilize MIS on a limited basis. However, SBA's MIS capability must be developed to a much higher level of sophistication. The relatively minor cost of such MIS development is far outweighed by the ultimate savings in SBA's administrative costs and increased effectiveness in management decisions and services to its small business clientele.

We trust that our observations and recommendations will be helpful to your continued efforts to strengthen the roll of minority business enterprise in the revitalization of the nation's economy.

TESTIMONY

BY

ROY LITTLEJOHN, PRESIDENT

BLACK PRESIDENTS' ROUNDTABLE ASSOCIATION

BEFORE THE

COMMITTEE ON SMALL BUSINESS

U.S. HOUSE OF REPRESENTATIVES

JUNE 16, 1982

Mr. Chairman, I am Roy Littlejohn, President of the Black Presidents' Roundtable Association (BPRA). The Black Presidents' Roundtable is an organization of the Presidents of over two hundred firms in the greater metropolitan Washington area with members from as far away as California. Our companies are diverse in nature with capabilities that include professional services, manufacturing, retail, architecture and engineering, financial management, communications, research and development, construction and public affairs.

The Black Presidents' Roundtable is a unique organization of chief executive officers of black-owned and operated firms. Our members have advance academic backgrounds and professional experience in economics, law, finance, public administration, science, business administration, marketing and public policy formulation and implementation. Many of our members have held responsible senior level management positions in the public and private sectors, including the Congress and agencies of the federal government. The Roundtable's uniqueness is further exemplified by its working committees which are comprised of chief executives who themselves identify and work on issues affecting the minority business community, current committees include 8(a) and other minority support programs, political action, economic development, finance, communications and organization. As required, issue oriented task forces are formed to study and make recommendations on policies and actions which impact the interest of our members and the minority business community at large.

Roundtable members are involved in a wide range of civic, political and community program, contributing our personal time and resources to the economic growth and development of our communities and the nation. We, as individuals, have chosen to enter the marketplace with full recognition of the attendant risks. We obviously have also taken this step in the hope of realizing the potential rewards of entrepreneurship--for ourselves, our families, our employees, our communities, and for the nation--which result from successful business enterprises.

Mr. Chairman, we appreciate the opportunity to share with this committee information which we believe serves to underscore the concern within the minority business community that there is a concerted effort by forces in the public and private sector to turn back the clock, to reverse, yes, to destroy the modest progress made by minority business during the past ten years. Much of this progress has been made possible by minority support programs within the federal establishment, most particularly the 8(a) program of the U.S. Small Business Administration.

Efforts to strengthen the 8(a) program particularly with your leadership and that of Representative Addabbo resulted in the passage of this landmark legislation, its implementation has been sabotaged by those who would reject the right of minority business to obtain an equitable share of federal procurements and subcontracts within the private sector.

During the past eighteen months, opposition to minority acquisition of an equitable market share has risen dramatically. With the exception of your voice and few others of your colleagues in the Congress, the decline of government commitment to support minority business development has proceeded downhill at a rapidly increasing place.

It can be generally stated that minority firms across this country are being destroyed by the double-edged sword of a depressed economy and institutional racism. We recognize that this economic recession plagues all aspects of American life; that the reduction of economic growth causes serious social dislocation and threatens our national security.

And while all small business is being adversely affected, this is evidenced by the fact that there are more bankruptcies now than in the last forth years. The additional burden of institutional racism and arbitrary constraints in the marketplace presents minority business with compounded problems and heightens the prospects for the destruction of our businesses.

We do not argue here that we are frequently faced with overt acts of discrimination by any single individual but we are constantly faced with the intractable nature of the "good old boys network", the insidious nature of the procurement process and growing insensitivity to problems of race. The result of all of this is a lessening of opportunity.

We at the Roundtable have become increasingly concerned about the cumulative effect of all of these conditions on our membership. A recent sampling of Roundtable members considered the impact of this double-edged sword. Twenty-four of our firms responded to the following questions:

1. How many years have you been in the 8(a) program?
2. What fixed program participation term (FPPT) were you given?
3. How many new contracts have you received since January 1981?
4. When did you receive you last contract?
5. How many employees have you laid off since January 1981?
6. What impact have changes in federal policies and contracting procedures which implement minority support programs had on your revenues?

The results of our sampling are as follows:

- o Average time in the 8(a) program was seven (7) years;
- o Average FPPT received was three (3) years, thirty-three percent received FPPT's of two (2) years or less;
- o Average number of contracts received since January 1981 was five (5);

- o Forty-two (42) percent of the firms had received two (2) contracts or less since January 1981;
- o Four (4) firms received no contracts since January 1981;
- o The average number of employees laid off by these small firms since January 1981 was 26;
- o Total employees laid off during the same period by these firms was 309;
- o One (1) firm has been forced to lay off 70 of its 84 employees since January 1981;
- o Four (4) firms lost one-third of their work force;
- o Four (4) firms lost one-half of their work force;
- o Three (3) firms lost two-thirds of their work force;
- o Almost fifty (50) percent of the firms surveyed have lost one-third or more of their work force. One company President reported that none of his laid off employees have found work;
- o Over thirty (30) percent of the firms have suffered a fifty (50) percent reduction in dollar volume of 8(a) contracts, three firms have suffered an over seventy (70) percent reduction in 8(a) contract dollar volume;
- o Those firms that have increased their marketing efforts with the Department of Defense have experienced the least negative impact.

Our unavoidable assumption is that the findings of our roundtable sampling is representative of the impact on similarly situated minority firms throughout the United States.

These grim facts are compounded by recent revelations that at least six of the key experienced personnel in the minority business development office of SBA who are responsible for processing 8(a) procurements have agreed to take "early outs". These massive SBA staff reductions of experienced personnel and similar reductions of 8(a) support staff by federal agencies is further evidence of declining federal commitment to the development of minority business.

Federal MBE support programs were initiated to counter the distorting effect of systematic discrimination on the marketplace. These programs can work. There is no need for reorganization or consolidation of the present program delivery system. What is needed is a clear commitment, in word and deed, at every level of the federal establishment to make these programs work.

In closing, I would like to submit for the record several items: the first is a letter with attachments which is representative of the problems experienced by many Roundtable companies in securing SBA assistance in updating their business development plans and increasing their levels of 8(a) contract support. The second is a copy of a recent testimony by a Roundtable representative before the President's advisory committee on small and minority business ownership offering specific recommendations for improvement in the administration of the 8(a) program and subcontracting requirements of P.L. 95-507. The third item is a paper written over a year ago by a Roundtable member which details the benefits of minority business enterprise to the U.S. economy.

Mr. Chairman, thank you again for the opportunity to appear before your committee. I would be pleased to answer any questions which you or your colleagues may have.

DISCUSSION PAPER

"A Competitive Minority Set-Aside Program"

by: Carl A. Brown
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I INTRODUCTION

It is proposed that the Federal Government establish "a competitive Minority Set-Aside Program" analogous to the "Competitive Small Business Set-Aside Program". The proposed program would be separate and apart from the existing 8(a) Program. This is a very simple idea. Some of the benefits are:

1. The Minority Set-Aside Program provides an intermediate place for graduated 8(a) firms which are not fully competitive. This in turn lessens the reluctance of 8(a) firms to graduate and opens the door for new entrants to the 8(a) Program.
2. The Minority Set-Aside Program provides access immediately to the approximately 500,000 minority-owned firms on a sheltered but competitive basis because all procurements (if over \$10,000) would be advertised in the Commerce Business Daily.
3. The Minority Set-Aside Program lessens pressure on the 8(a) waiting line because many applicants may opt to bypass the 8(a) Program entirely.
4. The Minority Set-Aside Program benefits the nation in the same way as the Small Business Set-Aside Program by:
 - a. developing competition through alternate sources.
 - b. increasing innovation.
 - c. creating jobs.
 - d. lowering costs.
5. The Minority Set-Aside Program decreases dependency, cuts welfare costs, develops minority management and promotes domestic tranquility because minority-owned firms employ minorities in greater proportion and in more responsible positions than do other firms.
6. The Minority Set-Aside Program permits the Small Business Administration (SBA) to concentrate its efforts and limited resources on a small finite rotating portfolio of firms not yet able to compete on even a sheltered basis.

7. The Minority Set-Aside Program is easy to administer. Because the procuring agency contracts directly with the minority-owned firm and the Contracting Officer is responsible for determining the potentially winning firm's eligibility, the Minority Set-Aside Program would operate like the Small Business Set-Aside Program.
8. Minority-owned firms would grow in sophistication and sharpen competitive skills as they moved from the 8(a) Program to the competitive Minority Set-Aside Program to the competitive Small Business Set-Aside Program to the large business, fully competitive world.
9. The Minority Set-Aside Program could be used as an incentive for 8(a) firms to "graduate" instead of "terminate", if eligibility were tied to graduation (for former 8(a) firms). This is analogous to the "Honorable Discharge" employment incentive offered to former military personnel. Thus, abuses of the past would be minimized.
10. The Minority Set-Aside Program would be more acceptable to the procuring agencies because these agencies would have more control.

II STRUCTURE

The exact structure of the proposed Minority Set-Aside Program may be implemented in a variety of ways. To promote discussion, the following "straw man" is provided:

ELIGIBILITY

1. All 8(a) firms
2. All graduated 8(a) firms
 - *Alternative A - until they exceed the size standard for the procurement.
 - *Alternative B - for a fixed period of time past 8(a) graduation (e.g. 5 years).
 - *Alternative C - no limit.
3. All minority-owned firms, not 8(a)
 - *Alternative A - until they exceed the size standard for the procurement.
 - *Alternative B - for a different fixed period of time (e.g. 10 years).
 - *Alternative C - no limit.



COUNCIL OF
POLLUTION CONTROL FINANCING AGENCIES

STATEMENT

PRESENTED TO
THE SENATE COMMITTEE ON SMALL BUSINESS
FEBRUARY 25, 1983

ON BEHALF OF THE COUNCIL OF POLLUTION
CONTROL FINANCING AGENCIES

By

WILLIAM J. COCHRAN
APPEARING AS A MEMBER
OF THE COUNCIL OF POLLUTION CONTROL FINANCING AGENCIES
AND
EXECUTIVE DIRECTOR
MICHIGAN JOB DEVELOPMENT AUTHORITY

MR. CHAIRMAN, MEMBERS OF THE COMMITTEE, I AM WILLIAM J. COCHRAN, EXECUTIVE DIRECTOR OF MICHIGAN JOB DEVELOPMENT AUTHORITY, AND A MEMBER OF THE COUNCIL OF POLLUTION CONTROL FINANCING AGENCIES. THE COUNCIL IS A NON-PROFIT ORGANIZATION FORMED BY LOCAL AND STATE AGENCIES WHICH SERVE AS ISSUERS OF TAX EXEMPT FINANCINGS FOR POLLUTION CONTROL AND SOLID WASTE FACILITIES. THE COUNCIL INCLUDES ASSOCIATE MEMBERS FROM THE FINANCIAL, LEGAL, AND INDUSTRIAL SECTORS. COUNCIL MEMBERS HAVE BEEN ACTIVE IN SUPPORTING THE AVAILABILITY OF TAX EXEMPT FINANCING AS AN IMPORTANT PART OF THE NATION'S EFFORT TO ACHIEVE ENVIRONMENTAL GOALS AND FASTER ECONOMIC DEVELOPMENT.

ON BEHALF OF THE COUNCIL, WE WELCOME THIS OPPORTUNITY TO PROVIDE THE COMMITTEE WITH OUR VIEWS REGARDING THE CURRENT STATUS OF TAX EXEMPT FINANCING OF POLLUTION CONTROL FACILITIES FOR SMALL BUSINESS.

MR. CHAIRMAN, AS YOU AND THE MEMBERS OF THE COMMITTEE ARE AWARE, ON DECEMBER 31, 1981, THE ADMINISTRATION ISSUED A DIRECTIVE THAT PRECLUDED THE SMALL BUSINESS ADMINISTRATION FROM ENTERING INTO POLLUTION CONTROL LOAN GUARANTEES COMMITMENTS. AT THE TIME OF THIS ACTION, SBA HAD \$250 MILLION IN FY 82 AUTHORIZATION AND HAD PROVIDED GUARANTEES ON A TAX-EXEMPT BASIS TOTALING APPROXIMATELY \$39.6 MILLION. THE OFFICE OF MANAGEMENT AND BUDGET HAD ADDITIONALLY DIRECTED THE SBA TO LIMIT ANY FURTHER GUARANTEE COMMITMENTS TO \$150 MILLION WITH THE STIPULATION THAT ANY NEW GUARANTEES WOULD BE FOR TAXABLE LOANS. CONGRESS IN ITS CONTINUING APPROPRIATIONS RESOLUTION DIRECTED THAT THIS PROGRAM, AT A MINIMUM, BE MAINTAINED AT A LEVEL OF \$175 MILLION. UNFORTUNATELY, OMB MAINTAINED THE FREEZE ON TAX EXEMPT GUARANTEES IGNORING CONGRESS' INTENT AND DISREGARDING THE HISTORY AND PURPOSE OF THIS CRITICAL PROGRAM.

LAST YEAR, THIS COMMITTEE TOOK THE NECESSARY ACTION TO REVERSE THIS UNFORTUNATE SET OF EVENTS, REPORTING TO THE SENATE S.2408, MANDATING THE PROVISION OF POLLUTION CONTROL LOAN GUARANTEES FOR TAX EXEMPT FINANCINGS. UNFORTUNATELY, THE SENATE WAS UNABLE TO CONSIDER THIS LEGISLATION PRIOR TO THE CONCLUSION OF THE 97TH CONGRESS AND THE ADMINISTRATION PROHIBITION REMAINS IN EFFECT. THIS COMMITTEE IS TO BE COMMENDED FOR ITS EFFORTS LAST YEAR TO RETURN THE GUARANTEE PROGRAM TO ITS ORIGINAL PURPOSE.

BECAUSE THAT EFFORT DID NOT SUCCEED, MANY BUSINESSES HAVE BEEN FORCED TO ABANDON EFFORTS TO FINANCE THE ACQUISITION OF POLLUTION CONTROL EQUIPMENT REQUIRED TO COMPLY WITH THE NATION'S ENVIRONMENTAL MANDATES AND REGULATIONS. NOT ONLY HAS THE ENVIRONMENT SUFFERED, BUT THE ECONOMY AS WELL. IMPORTANT INDUSTRIAL EXPANSION HAS BEEN LOST.

THE POLLUTION CONTROL LOAN GUARANTEE FOR TAXABLE FINANCINGS IS NOT A REALISTIC OPTION. IT FORCES A HEAVIER BURDEN OF POLLUTION CONTROL FINANCING UPON THE SHOULDERS OF BUSINESSES LEAST CAPABLE OF ACQUIRING THE NECESSARY CAPITAL. THE COUNCIL URGES THIS COMMITTEE TO TAKE EARLY ACTION TO REVERSE THIS UNFORTUNATE CHAIN OF EVENTS.

IT IS NOT DIFFICULT FOR LARGE WELL-KNOWN INDUSTRIAL CREDITS TO OBTAIN TAX-EXEMPT FINANCING FOR POLLUTION CONTROL FACILITIES. THEIR PROJECTS ARE LARGE ENOUGH SO POOLING IS NOT NECESSARY. THEIR RECOGNITION IN CAPITAL MARKETS MAKES A GUARANTEE UNNECESSARY, BUT EXPERIENCE INDICATES THAT SMALLER COMPANIES OFTEN CANNOT GAIN EQUAL ACCESS TO THE CAPITAL MARKETS FOR SUCH NON-INCOME PRODUCING INVESTMENTS. EVEN IF THEY COULD, THE TAXABLE INTEREST RATE COST WOULD BE MORE THAN THEY COULD AMORTIZE.

THE SBA POLLUTION CONTROL LOAN GUARANTEE PROGRAM WAS THE KEY FACTOR IN PUTTING THE SMALL COMPANY ON AN EQUAL FOOTING WITH THE LARGE INDUSTRIES. BY MAKING GUARANTEES AVAILABLE TO THESE FIRMS, THE SBA PROGRAM HAS MADE POOLING OF SMALL PROJECTS FINANCIALLY FEASIBLE AND FURNISHED A COMMON CREDIT THAT MADE POOLED BOND ISSUES MARKETABLE.

IN MY OWN STATE OF MICHIGAN, WE HAVE PROCESSED OVER 70 APPLICATIONS FOR ASSISTANCE UNDER THE TAX-EXEMPT OPTION. BUT UNDER THE TAXABLE OPTION WE HAVE HAD NOT A SINGLE APPLICATION. IT IS MY UNDERSTANDING THAT OTHER STATES SUCH AS CALIFORNIA AND ILLINOIS HAVE HAD SIMILAR EXPERIENCE.

I HAVE ATTACHED FOR THE COMMITTEE'S REVIEW A RECORD OF OUR PAST FINANCINGS UNDER THE TAX EXEMPT GUARANTEE. THERE ARE FOUR POOLED OR COMPOSITE-TYPE BOND ISSUES TOTALING \$16,395,000 FOR 35 SMALL INDUSTRIAL CONCERNS. THAT IS AN AVERAGE PROJECT SIZE OF \$468,000. THE OTHER PAGE LISTS 26 APPLICATIONS TOTALING \$17,070,000 WHICH WERE IN SOME STAGE OF PROCESSING WHEN THE SBA GUARANTEE PROGRAM WAS CLOSED DOWN. THESE COMPANIES ARE STILL SEEKING A WAY TO FINANCE THE FACILITIES THAT ARE BEING REQUIRED OF THEM. CLEARLY THESE NUMBERS SPEAK LOUDER THAN ANY WORDS.

AS EVIDENCE OF THE LACK OF ENTHUSIASM FOR THE TAXABLE GUARANTEE ALTERNATIVE AS A VIABLE OPTION, I DRAW YOUR ATTENTION TO THE RESPONSE SBA RECEIVED FOLLOWING ITS RETROACTIVE POLICY CHANGE CONCERNING THE TERMINATION OF THE TAX-EXEMPT PROGRAM. SBA NOTIFIED OVER 100 BUSINESSES TO EITHER SWITCH TO THE TAXABLE GUARANTEE ROUTE OR FACE WITHDRAWAL OF THEIR APPLICATIONS. IN RESPONSE JUST ONE FIRM OUT OF THIS TOTAL NOTIFIED SBA OF ITS DESIRE TO SEEK A TAXABLE GUARANTEE. CLEARLY, THE LARGE MAJORITY OF THESE COMPANIES BELIEVE, AS I DO, THAT THE COSTS BECOME PROHIBITIVE UNDER THE TAXABLE GUARANTEE OPTION.

CONGRESS SPECIFICALLY MANDATED TAX-EXEMPT ISSUE GUARANTEES IN PUBLIC LAW 94-305. ON SEVERAL OCCASIONS LAST YEAR, CONGRESS RECONFIRMED ITS COMMITMENT TO TAX-EXEMPTS AND ADVISED SBA TO MAKE THESE GUARANTEES AVAILABLE. DESPITE THESE CONGRESSIONAL DIRECTIVES, THE SBA AND THIS ADMINISTRATION CONTINUE TO THWART CONGRESS' INTENT. THE COUNCIL OF POLLUTION CONTROL FINANCING AGENCIES URGES THIS COMMITTEE TO TAKE WHATEVER STEPS ARE NECESSARY TO INSURE THE SPEEDY REESTABLISHMENT OF THE SBA LOAN GUARANTEE PROGRAM.

CURRENTLY, WE ARE HEARING ENCOURAGING REPORTS THAT THE RECESSION HAS BOTTOMED OUT AND THE LONG AWAITED ECONOMIC RECOVERY IS ABOUT TO BEGIN. WE SUGGEST TO THE MEMBERS OF THIS COMMITTEE THAT THIS RECOVERY MAY WELL BE GOOD NEWS FOR THE LARGER INDUSTRIAL ORGANIZATION WITH READY ACCESS TO THE CAPITAL MARKET. BUT THE RECOVERY WILL HAVE A DIFFERENT MEANING FOR THE SMALL FIRM WITH AN ENVIRONMENTAL REGULATORY PROBLEM. IT IS NOT UNUSUAL FOR US TO MEET WITH MANAGEMENT OF COMPANIES IN BUSINESS FOR MANY DECADES BEFORE THEY REACHED THE STAGE OF HAVING ACCUMULATED A NET WORTH OF, SAY, \$500,000. NOW THEY ARE FACED WITH A GOVERNMENT ORDER TO INVEST IN AN AIR OR WATER POLLUTION ABATEMENT FACILITY COSTING A HALF MILLION DOLLARS, AS MUCH AS THEY HAVE BEEN ABLE TO ACCUMULATE IN 30 OR 40 YEARS. FOR THAT FIRM, YOUR DECISION IS CRITICAL. CAN THEY CONTINUE OPERATING AND CARRY SUCH A NON-INCOME PRODUCING CAPITAL INVESTMENT BURDEN? IF WE CAN SAY TO THEM "HERE IS A PROGRAM THAT WILL ALLOW YOU TO SPREAD THIS BURDEN OVER 20 YEARS AND AT THE LEAST POSSIBLE CAPITAL COST" THE RECOVERY MAY HAVE SOME MEANING FOR THEM BECAUSE THEY WILL BE ABLE TO SEE THEIR WAY CLEAR TO STAY IN BUSINESS. WITHOUT THAT MESSAGE THEIR CHOICE IS A GRIM ONE. IN MANY CASES IT MAY WELL BE THE END OF THAT SMALL ENTERPRISE.

THE PRESIDENT HAS REQUESTED THE CONGRESS TO PERMIT A PLANNED DEFERRAL OF \$1 MILLION IN THIS PROGRAM'S FUND; REDUCING PROGRAM ACTIVITY BY 40%. THE COUNCIL URGES THIS COMMITTEE TO MAKE AS ITS FIRST PRIORITY THE DISAPPROVAL OF THIS DEFERRAL AND PASSAGE OF LEGISLATION SIMILAR TO LAST YEAR'S BILL S.2408.

IN SUMMARY, MR. CHAIRMAN, THE COUNCIL URGES THIS COMMITTEE TO SET AS ITS KEY PRIORITIES:

- INTRODUCTION AND APPROVAL OF A RESOLUTION DISAPPROVING THE ADMINISTRATION'S PLANNED DEFERRAL IN PROGRAM AUTHORITY FOR THE POLLUTION CONTROL LOAN GUARANTEE PROGRAM.

- IMMEDIATE CONSIDERATION OF LEGISLATION ESTABLISHING SPECIFIC POLICY OF CONGRESS WITH RESPECT TO THE AVAILABILITY OF TAX EXEMPT LOAN GUARANTEES FOR POLLUTION CONTROL EQUIPMENT, SATISFACTORY LEVELS OF SUCH LOAN GUARANTEES TO BE PROVIDED AND RECONFIRM THE DEFINITION OF A QUALIFIED POLLUTION CONTROL LOAN GUARANTEE APPLICANT.

MR. CHAIRMAN, THIS CONCLUDES MY PRESENTATION. I WOULD BE PLEASED TO ANSWER ANY QUESTIONS.

MICHIGAN JOB DEVELOPMENT AUTHORITY

STATUS REPORT - December 31, 1982

SBA GUARANTEED POLLUTION CONTROL FINANCING PROGRAM

First Bond Issue - Six Companies - Closed July 19, 1979

<u>JDA File #</u>	<u>Company</u>	<u>Location</u>	<u>Type Pollution</u>	<u>Jobs Retained</u>	<u>Amount of Loan</u>
PC-2305	Ace Wiping Cloth Company	Detroit	Water	75	\$ 700,000
PC-2310	The Hicks Company	Alco	Air	12	170,000
PC-2317	Industrial Smelting	Detroit	Air	50	325,000
PC-2312	Organic Chemicals, Inc.	Grandville	Air & Water	55	250,000
PC-2311	Plymouth Metal Abrasive Co.	Westland	Air & Water	40	390,000
PC-2313	Precision Coatings, Inc.	Walled Lake	Air	59	565,000
	Total			301	\$3,420,000

Second Bond Issue - Fourteen Companies - Closed May 29, 1980

<u>JDA File #</u>	<u>Company</u>	<u>Location</u>	<u>Type Pollution</u>	<u>Jobs Retained</u>	<u>Amount of Loan</u>
PC-2304	Alcoa Aluminum, Inc.	Coldwater	Air	121	\$ 700,000
PC-2334	Arco Alloys Corporation	Detroit	Air	60	250,000
PC-2322	B & L Plating	Warren	Water	12	125,000
PC-2303	Chemical Recovery Systems	Romulus	Water	64	505,000
PC-2333	Deerborn Refining Company	Deerborn	Water & Air	45	665,000
PC-2325	East Shore Chemical	Muskegon	Water	65	250,000
PC-2339	General Oil Co., Inc.	Rosford Twp., Wayne Co.	Water & Solid Waste	24	410,000
PC-2337	Great Lakes Container Corp.	Pontiac Twp., Oakland Co.	Air	60	600,000
PC-2336	Mid-America Potato Company	Wyand	Water	110	600,000
PC-2330	Neison Industrial Services, Inc.	Detroit	Solid Waste & Water	55	600,000
PC-2335	Nordco Drums, Inc.	Muskegon	Water & Air	97	300,000
PC-2338	Springfield Foundry Co.	Bedford Twp., Calhoun Co.	Air & Solid Waste	34	575,000
PC-2332	Steel Improvement Company	Warren	Air	30	90,000
PC-2323	Widger Chemical Corporation	Warren	Air	47	215,000
	Total			624	\$5,685,000

Third Bond Issue - Five Companies - Closed October 16, 1980

<u>JDA File #</u>	<u>Company</u>	<u>Location</u>	<u>Type Pollution</u>	<u>Jobs Retained</u>	<u>Amount of Loan</u>
PC-2353	Ace Wiping Cloth Company	Detroit	Water	250	\$3,600,000
PC-2345	Certified Metal Finishing, Inc.	Benton Harbor	Water	20	150,000
PC-2349	Edwards Oil Service, Inc.	Detroit	Water	16	475,000
PC-2351	Lucas Asphalt & Radt-Mix, Inc.	Ludington	Air	65	265,000
PC-2340	Superior Polishing Company	Warren	Water	52	215,000
	Total			383	\$4,795,000

Fourth Bond Issue - Ten Companies - Closed April 2, 1981

<u>JDA File #</u>	<u>Company</u>	<u>Location</u>	<u>Type Pollution</u>	<u>Jobs Retained</u>	<u>Amount of Loan</u>
PC-2368	Detroit Tap & Tool	Chesbrough	Water	87	\$ 120,000
PC-2343	Finl-Finish Products, Inc.	Warren	Water	21	150,000
PC-2360	Howard Plating Industries, Inc.	Madison Heights	Water	100	700,000
PC-2363	J. D. Plating Co., Inc.	Madison Heights	Water	20	300,000
PC-2352	Krisman Metal Finishing Corp.	Benton Harbor	Water	21	625,000
PC-2301	Lake States Wood Preserving Co.	Manistig	Water	30	475,000
PC-2318	Michigan Drum Renovating	Warren	Air	16	180,000
PC-2309	Muskegon Chemical Co.	Whitnall	Water	21	220,000
PC-2396	Towes Plating Company	Towes City	Water	40	310,000
PC-2362	Wolverine Plating Corporation	Roseville	Water	14	325,000
	Total			390	\$3,405,000

(over)

MICHIGAN JOB DEVELOPMENT AUTHORITY

STATUS REPORT - December 31, 1982

Applications for which Inducement resolutions were originally adopted under the SBA Guaranteed Pollution Control Financing program, the status of which is unclear at this time. These companies were surveyed early in January, 1983, and expressed an interest to complete the financing if some kind of guarantee program can make financially feasible a pooled bond issue.

<u>JDA File #</u>	<u>Company</u>	<u>Location</u>	<u>Jobs Retained</u>	<u>Amount of Loan</u>
PC-2357	Alco Iron & Metal Company	Alco	42	\$ 275,000
PC-2389	Automatic Die Casting Specialist	Detroit	93	385,000
PC-2385	Carter's Waste Oil Reclamation	Detroit	15	440,000
PC-2344	Chrome Craft Corporation	Highland Park	43	615,000
PC-2370	Cook, E. T., Inc.	Pontiac	40	1,450,000
PC-2354	Exonatum Corporation	Rosli	55	110,000
PC-2383	Environmental Waste Control, Inc.	Inkster	14	900,000
PC-2371	Flynn Paving Co.	Southfield	15	1,000,000
PC-2389	Grand Rapids Asphalt Paving Co.	Grand Rapids	40	1,300,000
PC-2348	Groot Labs Container Corp.	Hamtramck	96	1,310,000
PC-2365	Huron Casting, Inc.	Pigeon	102	190,000
PC-2388	Industrial Smelting Company	Detroit	35	340,000
PC-2372	James, E. C., Plating Company	Warren	80	400,000
PC-2384	Lawrence Industries, Inc.	Plainwell	20	160,000
PC-2358	Marsh Plating Corporation	Ypsilanti	171	3,000,000
PC-2387	Mid-State Plating Co., Inc.	Flint	11	125,000
PC-2367	Hilford Radi-Wix Company	Hilford	13	460,000
PC-2341	Modern Hard Chrome Service Co.	Warren	82	600,000
PC-2377	National Black Company	Westland	35	300,000
PC-2379	Palace Quality Service	Detroit	241	1,700,000
PC-2366	Rampart Industries, Inc.	Detroit	10	160,000
PC-2373	Road Plating Company	Center Line	22	290,000
PC-2342	Ridley Plating Company	Belvidale	34	400,000
PC-2347	Smith, F. E., Castings, Inc.	Kingsford	44	50,000
PC-2361	United Paint & Chemical Corp.	Southfield	9	750,000
PC-2364	W. E. Company	Detroit	35	360,000
Total			<u>1,397</u>	<u>\$17,070,000</u>

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MICHIGAN JOB DEVELOPMENT AUTHORITY

STATUS REPORT - December 31, 1982

SBA GUARANTEED POLLUTION CONTROL FINANCING PROGRAM

First Bond Issue - Six Companies - Closed July 19, 1979

<u>JDA File #</u>	<u>Company</u>	<u>Location</u>	<u>Type Pollution</u>	<u>Jobs Retained</u>	<u>Amount of Loan</u>
PC-2305	Ace Wiping Cloth Company	Detroit	Water	75	\$ 700,000
PC-2310	The Hicks Company	Alma	Air	12	170,000
PC-2317	Industrial Smelting	Detroit	Air	50	325,000
PC-2312	Organic Chemicals, Inc.	Grandville	Air & Water	55	250,000
PC-2311	Plymouth Metal Abrasive Co.	Westland	Air & Water	40	390,000
PC-2313	Precision Coatings, Inc.	Milled Lake	Air	69	545,000
	Total			301	\$2,400,000

Second Bond Issue - Fourteen Companies - Closed May 29, 1980

<u>JDA File #</u>	<u>Company</u>	<u>Location</u>	<u>Type Pollution</u>	<u>Jobs Retained</u>	<u>Amount of Loan</u>
PC-2324	Alchem Aluminum, Inc.	Coldwater	Air	121	\$ 700,000
PC-2334	Arco Alloys Corporation	Detroit	Air	60	250,000
PC-2322	B & L Plating	Warren	Water	12	125,000
PC-2303	Chemical Recovery Systems	Romulus	Water	64	505,000
PC-2333	Dearborn Refining Company	Dearborn	Water & Air	45	865,000
PC-2325	East Shore Chemical	Muskegon	Water	65	250,000
PC-2339	General Oil Co., Inc.	Bedford Twp., Wayne Co.	Water & Solid Waste	24	410,000
PC-2337	Great Lakes Container Corp.	Pontiac Twp., Oakland Co.	Air	60	600,000
PC-2336	Mid-America Potato Company	Wyoming	Water	110	600,000
PC-2330	Nelson Industrial Services, Inc.	Detroit	Solid Waste & Water	55	600,000
PC-2335	Nordco Drum, Inc.	Muskegon	Water & Air	97	300,000
PC-2338	Springfield Foundry Co.	Bedford Twp., Calhoun Co.	Air & Solid Waste	34	575,000
PC-2332	Steel Improvement Company	Warren	Air	30	90,000
PC-2323	Widger Chemical Corporation	Warren	Air	47	215,000
	Total			824	\$5,485,000

Third Bond Issue - Five Companies - Closed October 16, 1980

<u>JDA File #</u>	<u>Company</u>	<u>Location</u>	<u>Type Pollution</u>	<u>Jobs Retained</u>	<u>Amount of Loan</u>
PC-2353	Ace Wiping Cloth Company	Detroit	Water	250	\$3,600,000
PC-2345	Certified Metal Finishing, Inc.	Benton Harbor	Water	20	150,000
PC-2349	Edwards Oil Service, Inc.	Detroit	Water	16	475,000
PC-2351	Laman Asphalt & Redi-Mix, Inc.	Ludington	Air	65	265,000
PC-2340	Superior Polishing Company	Warren	Water	42	215,000
	Total			393	\$4,705,000

Fourth Bond Issue - Ten Companies - Closed April 2, 1981

<u>JDA File #</u>	<u>Company</u>	<u>Location</u>	<u>Type Pollution</u>	<u>Jobs Retained</u>	<u>Amount of Loan</u>
PC-2355	Detroit Tap & Tool	Cheboygan	Water	87	\$ 120,000
PC-2343	Final-Finish Products, Inc.	Warren	Water	21	150,000
PC-2360	Howard Plating Industries, Inc.	Madison Heights	Water	120	700,000
PC-2363	J. B. Platino Co., Inc.	Madison Heights	Water	20	300,000
PC-2352	Krieman Metal Finishing Corp.	Benton Harbor	Water	21	625,000
PC-2301	Lake States Wood Preserving Co.	Munising	Water	30	475,000
PC-2318	Michigan Drum Renovating	Warren	Air	16	180,000
PC-2359	Muskegon Chemical Co.	Whitehall	Water	21	220,000
PC-2356	Towes Plating Company	Towes City	Water	40	310,000
PC-2362	Wolverine Plating Corporation	Roseville	Water	14	325,000
	Total			390	\$3,405,000

(Cont.)

MICHIGAN JOB DEVELOPMENT AUTHORITY

STATUS REPORT - December 31, 1982

Applications for which Inducement resolutions were originally adopted under the SBA Guaranteed Pollution Control Financing program, the status of which is unclear at this time. These companies were surveyed early in January, 1983, and submitted an agreement to complete the financing if some kind of guarantee program can make financially feasible a partial bond issue.

JDA File #	Company	Location	Jobs Retained	Amount of Loan
PC-2357	Alma Iron & Metal Company	Alma	42	\$ 275,000
PC-2389	Automatic Die Casting Specialties	Detroit	93	385,000
PC-2385	Carter's Waste Oil Refinement	Detroit	15	440,000
PC-2344	Chrome Craft Corporation	Highland Park	43	615,000
PC-2370	Cook, E. T., Inc.	Pontiac	40	1,490,000
PC-2354	Enamelall Corporation	East	55	110,000
PC-2383	Environmental Waste Control, Inc.	Inkster	14	900,000
PC-2371	Flynn Plating Co.	Eastfield	15	1,000,000
PC-2369	Grand Rapids Asphalt Paving Co.	Grand Rapids	40	1,200,000
PC-2346	Great Lakes Container Corp.	Hamtramck	96	1,310,000
PC-2365	Huron Casting, Inc.	Piquette	102	180,000
PC-2388	Industrial Swelling Company	Detroit	26	340,000
PC-2372	Jones, R. C., Plating Company	Warren	80	400,000
PC-2384	Lawrence Industries, Inc.	Plainfield	28	180,000
PC-2358	Marsh Plating Corporation	Ypsilanti	171	2,000,000
PC-2387	Mid-State Plating Co., Inc.	Flint	11	125,000
PC-2367	Milford Reel-Wire Company	Milford	13	480,000
PC-2341	Modern Hand Chrome Service Co.	Warren	82	600,000
PC-2377	National Black Company	Westland	26	200,000
PC-2379	Palace Quality Service	Detroit	201	1,700,000
PC-2366	Rampert Industries, Inc.	Detroit	10	160,000
PC-2373	Reed Plating Company	Canton, Ohio	22	290,000
PC-2342	Reilly Plating Company	Harborside	34	400,000
PC-2347	Smith, F. E., Castings, Inc.	Kingsford	44	50,000
PC-2361	United Paint & Chemical Corp.	Southfield	9	750,000
PC-2364	M. E. Company	Detroit	25	200,000
Total			<u>1,397</u>	<u>\$17,020,000</u>

(over)

MICHIGAN JOB DEVELOPMENT AUTHORITY

STATUS REPORT - December 31, 1982

IGA GUARANTEED POLLUTION CONTROL FINANCING PROGRAM

First Bond Issue - Six Companies - Closed July 19, 1979

<u>JDA File #</u>	<u>Company</u>	<u>Location</u>	<u>Type Pollution</u>	<u>Jobs Retained</u>	<u>Amount of Loan</u>
PC-2306	Ace Wiping Cloth Company	Detroit	Water	75	\$ 700,000
PC-2310	The Hicks Company	Alma	Air	12	170,000
PC-2317	Industrial Smelting	Detroit	Air	50	225,000
PC-2312	Organic Chemicals, Inc.	Grandville	Air & Water	55	250,000
PC-2311	Plymouth Metal Abrasive Co.	Westland	Air & Water	40	390,000
PC-2313	Precision Coatings, Inc.	Walled Lake	Air	62	565,000
	Total			301	\$2,400,000

Second Bond Issue - Fourteen Companies - Closed May 20, 1980

<u>JDA File #</u>	<u>Company</u>	<u>Location</u>	<u>Type Pollution</u>	<u>Jobs Retained</u>	<u>Amount of Loan</u>
PC-2324	Alchem Aluminum, Inc.	Coldwater	Air	121	\$ 700,000
PC-2334	Arco Alloys Corporation	Detroit	Air	60	250,000
PC-2322	B & L Plating	Warren	Water	12	125,000
PC-2303	Chemical Recovery Systems	Ramulus	Water	64	505,000
PC-2333	Deerborn Refining Company	Deerborn	Water & Air	45	665,000
PC-2325	East Shore Chemical	Muskegon	Water	85	250,000
PC-2339	General Oil Co., Inc.	Bedford Twp., Wayne Co.	Water & Solid Waste	24	410,000
PC-2337	Great Lakes Container Corp.	Pontiac Twp., Oakland Co.	Air	60	600,000
PC-2336	Wis-America Potato Company	Wyoming	Water	110	600,000
PC-2330	Nelson Industrial Services, Inc.	Detroit	Solid Waste & Water	55	600,000
PC-2335	Hardice Drum, Inc.	Muskegon	Water & Air	97	300,000
PC-2338	Springfield Foundry Co.	Bedford Twp., Calhoun Co.	Air & Solid Waste	34	575,000
PC-2332	Steel Improvement Company	Warren	Air	30	90,000
PC-2323	Vidger Chemical Corporation	Warren	Air	47	215,000
	Total			674	\$5,685,000

Third Bond Issue - Five Companies - Closed October 16, 1980

<u>JDA File #</u>	<u>Company</u>	<u>Location</u>	<u>Type Pollution</u>	<u>Jobs Retained</u>	<u>Amount of Loan</u>
PC-2353	Ace Wiping Cloth Company	Detroit	Water	250	\$3,600,000
PC-2345	Certified Metal Finishing, Inc.	Benton Harbor	Water	20	150,000
PC-2349	Edwards Oil Service, Inc.	Detroit	Water	16	475,000
PC-2351	Loman Asphalt & Radi-Mix, Inc.	Ludington	Air	65	265,000
PC-2340	Superior Polishing Company	Warren	Water	42	215,000
	Total			393	\$4,705,000

Fourth Bond Issue - Ten Companies - Closed April 2, 1981

<u>JDA File #</u>	<u>Company</u>	<u>Location</u>	<u>Type Pollution</u>	<u>Jobs Retained</u>	<u>Amount of Loan</u>
PC-2366	Detroit Tap & Tool	Cheboygan	Water	87	\$ 120,000
PC-2343	Finl-Finish Products, Inc.	Warren	Water	21	150,000
PC-2360	Howard Plating Industries, Inc.	Madison Heights	Water	120	700,000
PC-2363	J. B. Plating Co., Inc.	Madison Heights	Water	20	300,000
PC-2352	Krisman Metal Finishing Corp.	Benton Harbor	Water	21	625,000
PC-2301	Lake States Wood Preserving Co.	Nursing	Water	30	475,000
PC-2318	Michigan Drum Remanufacturing	Warren	Air	16	180,000
PC-2359	Muskegon Chemical Co.	Whitshall	Water	21	220,000
PC-2356	Towes Plating Company	Towes City	Water	40	310,000
PC-2362	Wolverine Plating Corporation	Roseville	Water	14	325,000
	Total			390	\$3,405,000

(over)

RECHIGAN JOB DEVELOPMENT AUTHORITY
STATUS REPORT - December 31, 1962

Applications for which Indocement resolutions were originally adopted under the SBA Guaranteed Pollution Control Financing program, the status of which is unclear at this time. These companies were surveyed early in January, 1963, and expressed an interest to complete the financing if some kind of guarantee program can make financially feasible a pooled bond issue.

<u>JDA File #</u>	<u>Company</u>	<u>Location</u>	<u>Jobs Retained</u>	<u>Amount of Loan</u>
PC-2357	Alme Iron & Metal Company	Alme	42	\$ 275,000
PC-2389	Automatic Die Casting Specialties	Detroit	93	385,000
PC-2385	Cartar's Waste Oil Reclamation	Detroit	15	440,000
PC-2344	Chrome Craft Corporation	Highland Park	43	615,000
PC-2370	Cook, E. T., Inc.	Pontiac	40	1,450,000
PC-2354	Exumline Corporation	Rochester	55	110,000
PC-2383	Environmental Waste Control, Inc.	Inkster	14	900,000
PC-2371	Flynn Paving Co.	Southfield	18	1,000,000
PC-2380	Grand Rapids Asphalt Paving Co.	Grand Rapids	40	1,300,000
PC-2346	Great Lakes Container Corp.	Hemlock	96	1,310,000
PC-2365	Huron Casting, Inc.	Pigeon	102	190,000
PC-2388	Industrial Smelting Company	Detroit	35	340,000
PC-2372	Jones, R. C., Plating Company	Warren	80	400,000
PC-2384	Lawrence Industries, Inc.	Plainfield	20	160,000
PC-2358	Marsh Plating Corporation	Ypsilanti	171	3,000,000
PC-2387	Mid-State Plating Co., Inc.	Flint	11	125,000
PC-2367	Wilford Radi-Hiz Company	Wilford	13	860,000
PC-2341	Modern Hard Chrome Service Co.	Warren	82	800,000
PC-2377	National Black Company	Westland	35	300,000
PC-2379	Palace Quality Service	Detroit	241	1,700,000
PC-2366	Rampart Industries, Inc.	Detroit	10	160,000
PC-2373	Reed Plating Company	Canton Line	22	290,000
PC-2342	Reilly Plating Company	Melvindale	34	400,000
PC-2347	Smith, F. E., Castings, Inc.	Kingsford	44	50,000
PC-2361	United Paint & Chemical Corp.	Southfield	9	750,000
PC-2364	W. E. Company	Detroit	25	360,000
	Total		<u>1,297</u>	<u>\$17,070,000</u>

(over)

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RESEARCH
Volume 12, 1975
STRUCTURE AND FUNCTION
David P. Gorman
RESEARCH SUBJECTS
Volume 12, 1975
Charles C. Johnson
Volume 12, 1975

Before the SENATE SMALL BUSINESS COMMITTEE

February 25, 1983

1. SDIC ISSUES

A. Small Business Committee Jurisdiction:

1. Increased Leverage for SBICs and MESBICs
2. Establishment of Capital Bank for SBICs
3. An Associate Administrator for Investment, SBA

B. Jurisdiction of Other Committees:

1. Pass-through Tax Treatment for Public SBICs
2. Lower Tax Rates on Corporate Capital Gains
3. Pension Fund Investments in Unincorporated SBIC

II. GENERAL SMALL BUSINESS ISSUES

A. Small Business Committee Jurisdiction:

1. Expansion of SBA's Job Creation Programs
2. Wider Authority for SBA Administrator

B. Jurisdiction of Other Committees:

1. Lower Tax Rates on Longer Term Capital Gains
2. Repeal of Section 385 of Internal Revenue Code
3. Provide for Small Business Participating Debenture
4. Better Treatment for Incentive Stock Options

[illegible]

STATEMENT OF WALTER B. STULTS

TO THE MEMBERS OF THE SENATE SMALL BUSINESS COMMITTEE:

I am Walter B. Stults, President of the National Association of Small Business Investment Companies. Thank you for allowing NASBIC to present its legislative priorities as your Committee prepares its agenda for the coming year.

I wish to begin by urging the Committee to focus its efforts during the next 12 months to the issue of job creation in the private sector of the American economy. Without any question, new and growing small business concerns create the overwhelming majority of all new jobs. I am disappointed that the Administration did not recognize this fact in its State of the Union or Budget Messages. Several Members of the Senate and the House have called for Congressional action to buttress the independent sector's ability to provide additional employment but I hope that your Committee will make job creation the paramount touchstone in setting its objectives.

I. SBIC ISSUES

I cannot claim to be an unbiased observer, but I believe solid facts back up my claim that SBICs help create jobs in a tremendously cost-effective manner. Both SBA and NASBIC have submitted studies to your Committee which give full support to that contention. In this section of my presentation, I shall suggest six specific Congressional actions which would permit the SBIC industry to foster the creation of thousands of permanent new jobs in a short period of time -- and at very little cost to the Federal Government.

A. Within Jurisdiction of Small Business Committee:

1. Additional Leverage for SBICs:

Despite economic uncertainties, the Nation's 365 SBICs have invested at a record rate during the past two years. Our executives have remained optimistic about the long-term outlook and about the ability of smaller firms to compete effectively both domestically and in foreign markets.

Because our members have been so active -- and because millions of dollars of additional private capital have come into the industry -- SBA has not had the authority to provide the borrowings (we call this "leverage") SBICs have required. We could have used much greater leverage in fiscal 1981 and 1982 and the shortfall will be even greater in the current fiscal year.

We are asking that the Committee increase SBA's leverage authorization from the present \$160-million to \$250-million for both fiscal 1983 and 1984. You'll recall that your Committee approved legislation last year which would have raised these

ceilings to \$225-million, but that bill was not taken up by the Senate. Incidentally, the House did approve the \$250-million leverage ceiling last year.

2. A Private Capital Bank for SBICs:

NASBIC is currently exploring the feasibility of creating a Capital Bank for SBICs which would wholly or partially assume SBA's role in providing additional resources for our industry. We are not yet in a position to present details on this proposal, but we did wish to alert the Committee to the possibility of making the SBIC program even more completely a private undertaking.

The November 1982 Report of the SEC Government-Business Forum on Small Business Capital Formation gave its endorsement to such a proposal. NASBIC will inform your Committee of any legislative initiatives which are required in this area as soon as possible.

3. An Associate Administrator for Investment at SBA:

For most of the 25 years of the SBIC industry, SBA's role in the undertaking has been led by an official whose sole responsibility was administering the Small Business Investment Act of 1958. Over most of the past seven years, however, that position was consolidated with the Finance function, meaning that one person was responsible for all of SBA's many lending programs, as well as the Investment Division.

We ask that Congress reiterate its decision, as stated in the Small Business Investment Act, that SBA assign one person at the level of Associate Administrator solely to head the Investment Division. That official should be held responsible for the Agency's dealings with SBICs and MESBICs.

B. Jurisdiction of Other Committees:

1. Give Pass-through Tax Treatment to Public SBICs:

In 1980, Congress passed the Small Business Investment Incentive Act of 1980 which allowed publicly-owned SBICs and venture capital companies the right to operate under that Act rather than registering under the Investment Company Act of 1940. This was an important action, since most venture capital firms found it impossible to comply with the strictures of the 1940 Act. Unfortunately, however, only publicly-owned companies registered under the 1940 Act can elect to pass through income to their shareholders under Section 851 of the Internal Revenue Code. We have been trying to eliminate this "Catch-22" situation for the past two and a half years. The Senate has agreed with our position twice by adding a minor, revenue-neutral change in the tax code as an amendment to House-passed tax bills, but House conferees have so far refused to accept the Senate amendments.

We ask your Committee to take the lead, once again, to enact this non-controversial provision.

2. Lower Tax Rates on Corporate Capital Gains

Corporate and individual capital gains tax rates have usually been the same, but Congressional approval of ERTA in 1981 removed that parallel treatment. The 1981 Act lowered the tax rate on long-term capital gains for individuals to 20%, but left the corporate levy at 28%.

Since almost all SBICs operate in corporate form, the tax law discriminates against most of our industry. We believe strongly that long-term investment in small business is an important public-policy objective -- and that a reduction in tax rates on long-term capital gains for corporations would redound to the advantage of the economy without revenue loss.

3. Pension Fund Investments in Unincorporated SBICs

Pension funds, endowments, and other non-profit institutions are effectively prohibited from investing in SBICs which are organized as partnerships. IRS has imposed stringent restrictions on the ability of such non-profits to receive any income which arises from the use of borrowings. For that reason, if a pension fund becomes a limited partner in an unincorporated SBIC which utilizes leverage, a share of the SBIC's earnings are attributed to the pension fund and become fully taxable as "unrelated business income".

We do not believe the regulations in the Internal Revenue Code were designed to exclude this result. We believe such small business and the beneficiaries of endowments and pension funds gain from the latter's investments in venture capital companies, so we propose an amendment to the Code which would remove this disincentive.

II. GENERAL SMALL BUSINESS ISSUES

In a sense, the division of my presentation into two major segments is false, because any action which permits small business to operate more efficiently and more profitably is most important to SBICs -- and any change benefiting SBICs will surely impact favorably on smaller firms. Nonetheless, I have divided my proposals into "SBIC" and "Small Business" categories, so let's proceed to the latter.

A. Small Business Committee Jurisdiction:

1. Many SBA Programs Should Be Expanded:

Earlier, I pointed out that small business is the premier job creator in the U.S. economy. The SBC program is only one of the component programs under the Small Business Administration which augment that job creation process. For this reason, I believe that it would be wise to make certain that SBA has the resources and the authority to channel more assistance to small business. Specifically, I think the Section 7(a) loan program under a new format should permit more banks and other financial institutions to provide needed financing for young and growing companies. In the same way, the Section 503 guarantee program should be enlarged to allow additional private dollars to flow to independent businesses.

2. Enlarge the Role of the SBA Administrator:

Ever since the Small Business Administration was established 30 years ago, its role has been denigrated by the lack of political clout wielded by its Administrator. This has been true in Republican and Democratic Administrations alike. Never has the SBA chief been an integral part of the Government's economic policymaking process; never has he been in a position to advocate the specific strengths and weaknesses of small business in the American economy.

Quite frankly, I am not certain that your Committee, or Congress as a whole can do to change this serious situation. In the past, small business organizations have diagnosed the value of having the Executive Branch -- or at least one of its departments -- be concerned with a part of the President's cabinet, but we have always found that such actions alone prove only modest success in making the improvement.

Nonetheless, I believe your Committee should continue the search for means to guarantee that knowledge of the unique potentials and vulnerabilities of small business be brought to bear whenever the Executive or Legislative Branches of the Federal Government discuss basic economic policies.

B. Jurisdiction of Other Committees:

All four of the proposals in this category are tax-related, so all fall within the purview of the Finance Committee. I suppose this concentration of issues demonstrate how crucial tax laws and policies are to the survival and vitality of small business in the United States.

1. Lower Taxes on Long-Term Small Business Investments:

For a number of years, small business organizations have fought for a "roll-over" provision in our Federal tax law which would defer the imposition of any capital gains taxes so long as the proceeds of the investment are reinvested in the securities of a qualifying small business. NABBE continues to believe that this would be one of the most productive of all changes in the Internal Revenue Code. We are certain it would spur greatly-expanded investing in new and growing businesses; Furthermore, we are sure that any revenue loss to the Government would soon be more than offset by the higher profitability of those firms receiving the new equity capital.

Since the rollover has not been enacted, we feel an intermediate step should be embraced by Congress and the Administration. This action would provide an 80% exclusion for gains realized on equity-type investments in a small business, so long as they are held for at least five years. Such a provision would balance more equitably the nature of the risks and rewards of long-term investments in small business and give a major impetus to individual and institutional venture capital investments in the most productive segment of the economy.

2. Authorizes Small Business Participating Debentures:

Ever since this proposal was given high priority by the delegates to the White House Conference on Small Business in 1965, small business has pressed for action. The Senate and House Small Business Committees have held numerous hearings, the National Taxpayers' Committee has introduced over 200 legislative proposals on this long-pending issue.

NABBE continues to feel that this proposal is sound and should be endorsed by your Committee and passed as a high priority item to the Finance Committee.

3. Repeal Section 385 of the Internal Revenue Code:

For the past 14 years, the Treasury Department has been trying to define what constitutes debt or equity for tax purposes. This task was given the Department by Congress in 1969 when it enacted Section 385 of the Code. The latest draft of the debt-equity rules may conceivably mark some improvement over the first proposal, but it's merely a matter of a slow death for smaller firms, rather than immediate execution.

We believe the Treasury Department will come up with one more attempt, but we are certain that the new draft will be no more realistic than earlier versions. For that reason, I merely suggest that the Committee leave an opening in its agenda, so the small business community will be able to speak its piece and urge your support for legislation to repeal Section 385 outright later this year.

4. Restoration of Incentive Stock Options:

My last proposal deals with the incentive stock options which are so important for growing businesses seeking to attract and hold highly-qualified managers. In 1981, SBA gave the green light to this pro-small business initiative, but the cutbacks contained in the 1982 TEFRA removed much of the value of ISO's. Over a period of many years, your Committee has supported the issuance of such options by smaller firms, so we ask that you urge that the restrictions mandated in TEFRA be eliminated insofar as small firms are concerned.

Thank you again for giving me this opportunity to suggest important subjects which your Committee should address during the coming year.

Mr. Chairman:

Small Business Institute Directors' Association. The SBIDA is composed of faculty members from across the country who direct Small Business Institutes at their universities and colleges. I might add that our dues of \$25 per member yield a total of less than \$9,000, no one is salaried, and I traveled farther than anyone else testifying today.

Approximately 450 universities and colleges participate in the program. Next year about 3750 small businesses will be assisted. In each case, a student team, normally composed of 3 to 5 graduate students or seniors enrolled in business or engineering, counsels a small business.

The counseling varies with the needs of the business, but generally involves market analysis, financial planning, inventory and quality control, advertising, establishing accounting systems developing business strategies, personnel policies, and productivity problems.

The student team meets regularly with the client, receives guidance from faculty members, and prepares both written and oral reports for the client. All client information is held in strictest confidence. The students' grades depend upon the quality of the assistance offered.

Last month, the SBA issued its latest study of the SBI program. In summary, it found that:

- 67% of the clients indicated that they acquired management skills through the assistance;
- 79% were better able to identify problems in their firms;
- 67% were able to plan solutions more effectively;

- 73% had initiated changes suggested;
- 70% planned to make future changes based on the advice;
- 64% believed that the assistance improved their chance of economic survival.

While these numbers are indicative of the value and success of the SBI program, the written comments on over 60% of the evaluation forms provide an even better understanding of the small business owners' opinion of the SBI program:

- "- The recommendations and advice received throughout the counseling sessions were of great value and much appreciated. Although some policies are hard to change, it snapped us out of the routine and made us think once again."
- "- The SBI team was exceptional in their quick understanding and comprehension of the problem. They recommended and helped to implement a very practical solution."
- "- I appreciate the effort the students made and feel their report along with pre-printed pamphlets will help my business a good deal."
- "- I was extremely pleased with the recommendations made by the group and suggest it to any businessperson looking to improve their business."
- "- The value of their reviews and advice is most helpful-- particularly to those of us who are novices."
- "- The program was a significant advancement for the company. It would be most useful if the program were to be maintained and continued."
- "- A worthwhile program--tremendously useful for the business

person with little formal business background."

- " His written report pulled together our conversations and gives me something to refer back to. Many of the ideas will be implemented--as soon as things settle down, etc. The price for all this was right."
- "- A few new ideas were presented and some old ideas were reinforced. The changes that have been made have probably had a minor, but significant impact. Our business has improved generally in 1982."
- "- Without this study we couldn't have had an increase in sales."
- "- Without this team I would have manufactured a device to lift boats and would probably have failed--there was no market."

These highly favorable comments are better understood in light of a very recent study conducted by the NFIB of several thousand of its members. The respondents were asked to rank 72 small business problems. Of the 36 ranked in the top half, 26 were of the type that the SBI teams can address. Of the other 11, four dealt with taxes, three with utility costs, three with governmental paperwork and regulations, and one with interest rates. Thus, the SBI program provides help in areas considered very important by small business owners.

The SBA has a \$1.5 million dollar line item for the SBI program. This figure has been the same for several years. \$400 is provided by the SBA to schools for each client which receives assistance, up to the maximum number of cases authorized for the school. Before payment is actually made, SBA personnel review and approve the written reports. The funds are used by the schools to reimburse students for out-of-pocket expenses such as mileage, typing, duplicating, etc. No funds are used to

reimburse the school for faculty time, facilities used, etc. These are donated by the schools. Little is left over in most cases. If funds are available, they are normally spent for such things as faculty research on small business topics, training to improve faculty administration of the SBI programs, etc.

I am providing each of the committee members with a copy of the Proceedings of the recent national SBIDA meeting so that they can better understand the efforts which the SBIDA puts forth to maintain and improve the high quality of the SBI program.

In conclusion, I wish to urge that the funding level of the SBI program be increased to \$3.5 million.

February 25, 1983

STATEMENT BY
HORST G. DENK, CHAIRMAN
of the
INDEPENDENT BAKERS ASSOCIATION
before the
UNITED STATES SENATE
COMMITTEE ON SMALL BUSINESS
LEGISLATIVE PRIORITIES FOR THE 98TH CONGRESS

Mr. Chairman, my name is Horst G. Denk. I am President of Denk Baking Corporation, an independent wholesale bakery located in Brooklyn, New York. I serve as chairman of the Independent Bakers Association (IBA) and appear today in that capacity. With me is George Rosenthal, President of Fink Baking Corporation, a variety baker located in Long Island City, New York. Mr Rosenthal serves as the chairman of the National Affairs Committee of IBA. IBA is a national trade association comprised of independent small and medium sized wholesale bakeries, most of which are family owned. Collectively our members produce nearly half of the wholesale bread sold in the United States.

In addition to representing IBA, Mr Chairman, we appear as good citizens interested foremost in the health and well-being of our great country. Although our legislative recommendations are largely in reference to the specific needs and

concerns of the baking industry, we do favor national programs like social security reform. We thank you for this opportunity to come before this Committee to present our legislative priorities for the 98th Congress and our suggestions for change.

SOCIAL SECURITY

IBA supports the recommendations of the National Commission on Social Security Reform. As described in the Administration's budget, IBA endorses the following:

- o new coverage and contribution by federal employees, and non-profit institutional employees;
- o tax social security benefits of high-income recipients (taxes to start after full reimbursement completed);
- o delay cost-of-living increases six months;
- o accelerate scheduled 1988-89 tax increase;
- o improve equity of social security benefits;
- o cut self-employment advantages;
- o provide a series of long-range actuarial reforms.

IBA urges Congress to enact the bi-partisan package as soon as possible to ensure the fiscal soundness of the system.

SUGAR PRICE RELIEF

Since the institution of the current federal sugar price support program, IBA has worked with a broad-based user coalition to reduce or eliminate government involvement in sugar prices. The current program pegs raw sugar prices on a wholesale level at 22-23 cents per pound while world prices are in

the 6-7 cents range. In addition, sugar supports act to keep other sweeteners, including fructose corn syrup, well above the price producers need for profitable operations. IBA seeks relief from unfair sugar prices which are hurting both bakers and consumers.

PAYMENT-IN-KIND

IBA supports Agriculture Secretary John Block's innovative payment-in-kind (PIK) program which will spur an economic recovery in the farm community. By paying the farmers in bushels of the same surplus commodity they might otherwise have grown, the program will achieve the dual goal of providing relief for American farmers and reducing the government's burgeoning reserves which are costly to maintain. Although the program could result in higher wheat and thus flour costs, overall the program is commendable.

REGULATORY REFORM

IBA supports the efforts of the Administration to reduce the costly burden of federal regulations on business. The reduction in regulations by administrative actions thus far has been felt by the baking industry in a number of areas saving countless dollars and time. Congress should pass Reagan's Executive Order #12291 which requires federal agencies to submit major rules to the Office of Management and Budget for review and analysis. Enactment of this regulatory reform

bill would codify into law current regulatory relief practices, ensuring the continuation of relieving business of burdensome regulations.

NATURAL GAS PRICE REGULATION

The Natural Gas Policy Act (NGPA) was enacted by Congress in 1978 with the intention of increasing natural gas supplies by encouraging producers to explore for and drill new gas wells. Although NGPA succeeded in increasing natural gas supplies, it created a whole new set of problems that have caused domestic gas prices to spiral upward and totally disrupted the market. Since NGPA was enacted, the average price of natural gas has risen well over 100 percent, with continued price hikes forecast for this year.

Bakers, who are dependent on natural gas for heating their ovens, have deeply felt the impact of soaring gas prices. IBA believes that immediate action must be taken by the Congress to correct the chaotic U.S. natural gas market where demand is falling, supplies are increasing and prices are still going up. IBA supports the following program to stop rising natural gas prices and secure an orderly transition to the post-January 1985 deregulated field market for new gas:

- o leave Title I of NGPA which provides for the continued deregulation of new gas by 1/1/85 intact;
- o leave the incremental pricing and fuel use act intact;
- o for three years reduce the take-or-pay obligations in existing new gas contracts to a ceiling of 50 percent

of deliverability with exceptions allowed for drainage, associated gas, transportation considerations, other operational constraints and producer hardship;

- o cap indefinite escalator clauses with a floating cap reflective of current market conditions;
- o allow a one-time market-out for Section 107 gas;
- o permanently ban third party most favored nation clauses;
- o treat distributors minimum bill requirements as a declaration of congressional intent with flexible implementation by the Federal Energy Regulatory Commission.

MULTIEMPLOYER PENSION PLAN REFORM

The Multiemployer Pension Plan Amendments Act of 1980 (MPPAA) was intended to ensure the security and health of multiemployer pension plans by preventing a "mass withdrawal" of contributing employers from the plan. Withdrawal liability was instituted to assure that employers who left a multiemployer plan paid a fair share of the accrued unfunded vested benefits. However, withdrawal liability has resulted in the total disruption of daily business activities for many employers. Under MPPAA, our members can face millions of dollars in withdrawal liability which can be triggered by normal business transactions such as the closing of an inefficient plant, relocation or simply going out of business. Frequently, especially in the case of a small business, the withdrawal liability exceeds the entire net worth of the business. New accounting rules call for the listing of this unfunded liability on our members' balance sheets, making it impossible to borrow funds or sell their businesses.

In order to correct the unnecessary burden that MPPAA has created, the number of events triggering withdrawal liability should be reduced and measures should be taken to insure that plans are well-funded. IBA proposes the following changes to achieve these objectives:

- o no withdrawal liability should be imposed if a plan is fully funded;
- o involuntary withdrawals due to the death or retirement of a small businessman, bankruptcy or natural disaster should be exempted from withdrawal liability;
- o withdrawal due to a change in employee representation or an agreement with the union to transfer pension coverage should not trigger withdrawal liability for the employer;
- o sale of business assets should not trigger withdrawal liability if the purchaser assumes obligations under the plan;
- o eliminate the retroactive imposition of withdrawal liability on employers who withdrew from the plan during the window period from April 28, 1980 to September 26, 1980;
- o prohibit plan Trustees from increasing benefit levels unless the plan is well-funded, the vested funding benefits ratio must be at least .7 or greater during the first years after enactment of a bill increasing to .9-1.0 within ten years;
- o implement a risk-related premium payment.

FOOD SAFETY

IBA supports efforts to re-address current food safety laws. Specifically, we support the reform of the Delaney Clause that bans any substance in food shown to induce cancer in man or animals, regardless of any benefit associated with

its use. There is a broad consensus among government, academic and industry authorities that the food safety laws need reauthorization and that a new food safety policy, which recognizes technological advances and societal needs and desires, should be adopted. Recommendations should be made to include a risk/benefit analysis in food safety decision making and to permit the designation of certain substances as "acceptable risks".

Comprehensive changes in food safety laws should protect users of ingredients and conditions that are recognized to have minute risks, but which are approved by the FDA and Drug Administration on the risk/benefit evaluation basis, from the possibility of civil damage suits if those ingredients or conditions turn out to result in serious health defects.

FEDERAL BUDGET FREEZE

Recognizing the seriousness of our economic crisis, IBA endorses an across-the-board freeze as presented by Rep. Newt Gingrich (R-GA) and Senator Charles Grassley (R-IA). The savings will allow a lower deficit through 1988 without any tax increases. IBA supports a total federal budget freeze since it is the surest and fairest way to control growth of federal spending and we strongly urge Congress to pass this proposal.

MR. CHAIRMAN: I APPRECIATE THIS OPPORTUNITY TO PRESENT THE
 VIEWS OF OUR ASSOCIATION AND I COMPLETELY AGREE YOUR ASSIM-
 ILATION IN HAVING THAT THOSE INITIATIVE INTERESTS ARE CONSIDERED
 BY THE BOTH COUNTRIES AND THE ISSUES INVOLVED;

GATHEGE: ROBERT H. BYR
 INTERNATIONAL BANKERS ASSOCIATION
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**Small Business
Service Bureau Inc.**

NATIONAL LEGISLATIVE OFFICE
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**STATEMENT OF FRANCIS K. COYLE
LEGISLATIVE ADVOCATE
FOR THE
SMALL BUSINESS SERVICE BUREAU, INC.,**

NATIONAL LEGISLATIVE OFFICE

2021 K STREET N.W.,
WASHINGTON, D.C. 20006

BEFORE THE
SENATE COMMITTEE
ON
SMALL BUSINESS
FEBRUARY 25, 1983

The Foundation of America Is Free Enterprise

In preparing materials for the Senate Committee on Small Business Affairs and other committees, small business issues should be given priority. The Senate Committee on Small Business Affairs is currently in session and is reviewing legislation in major congressional areas.

You should also consider the importance of Senate hearings and Committee meetings for the discussion and action on the 97th Congress. Unfortunately, the Senate Committee on Small Business Affairs is currently reviewing legislation drafted by other committees.

In an effort to provide some suggested direction, our remarks will be confined to the following topics:

Social Security

Health Care Tax

Restaurant Tip Reporting

Export-Import Bank

SBA Size Standards

Foreign Corrupt Practices Act

Small Business Procurement Act

Patents

10% Withholding Tax

Bankruptcy Reform Act

Office Machine and Equipment Retail Dealers Agreement Act

Sales Representative Protection Act

Small Business Participating Ventures

SOCIAL SECURITY

The Small Business Service Bureau, Inc. is concerned about one critical issue at hand the proposed changes in the Social Security System. These changes will have a drastic effect on small business and especially the self-employed.

It is strikingly clear that a sharp increase such as in the self-employment tax, (increasing from 9.35 percent to 13.4 percent) will have an adverse effect on the self-employed of the nation. As one of our manufacturers said: "An increase like that of the self-employment tax would make me another bankruptcy statistic." A recent telephone survey of 500 SBSB members revealed that over 90 percent found the rise in the self-employment Social Security tax to be unjustified and discriminatory.

The self-employment tax, increase from 9.35 percent to 13.4 percent in 1984. This is an increase of 43 percent, whereas the employer/employee payroll tax would be increasing from 6.7 percent to 7 percent. In comparison, the self-employment tax will be eleven times (11) times more than the payroll tax. Why does the self-employed person bear the discrimination of such an increase? The self-employed would be expected to pay up to 50 percent more in increased FICA taxes than an individual taxpayer or a corporate taxpayer.

Small Business contribution to the Gross National Product (GNP) is 38 percent. The self-employed individual contributes 19 percent of the GNP. Instituting a self employment tax will have a devastating effect on the small business share in future years.

HEALTH CARE TAX

Small Business Service Bureau, Inc. (SBSB) strongly opposes the Reagan administration proposal to tax employer-paid health insurance premiums.

Under this Reagan proposal an employee would be taxed on all health insurance premium benefits over \$175/month. For the small business person, this is yet another tax to bear.

The administration is disguising this tax increase as a health care cost containment vehicle. With a \$150-\$200 billion dollar deficit, President Reagan will try to tax the small businessman's health care insurance in an effort to bring down the deficit. The administration believes that taxing health insurance premiums will raise new dollars to ease swollen deficits. A study by the National Center for Health Service Research pointed out that the federal government would increase income taxes by \$20.4 billion and increase social security taxes by over \$6 billion dollars.

Small Business already bears the highest health insurance premiums, and this is not a deduction for America's family businesses.

RESTAURANT TIP REPORTING

Small Business Service Bureau, Inc. strongly recommends the amending of the reporting of restaurant tips. This unfair charge will put many restaurants out of business.

Restaurants with 10 or more employees are required to report to the IRS the amount of their gross receipts from food and beverages and the total amount of tips. These reports must also show each employee's allowable share of tip income, which is assumed to be equal to 8% of gross receipts from food and beverage sales. If reported tips do not equal 8%, the employer must allocate extra tip income for his/her employees.

SBSB strongly opposes the IRS regulation that will create additional paperwork and financial burdens on the hotel and restaurant industries.

EXPORT-IMPORT BANK

American firms suffer a competitive disadvantage abroad in the area of international finance. Since the Export-Import Bank has been out under the budget process and cut, this further threatens our edge in foreign trade. As the bank is actually, self-supporting, we believe it should regain its independent status.

Bank participation in export trading companies can provide the financial resources and expertise that will be essential to the success of export trading companies.

SBSB believes that this program is essential for the exporting needs of small firms. This program should continue to be funded and to create a special emphasis on small exporters.

SBA SIZE STANDARDS

Ironically, the U.S. Small Business Administration is still grappling with a reused definition of small business. We feel that it is time that the Congress take control of this situation.

The size standard defining small business should be as follows:

Very small businesses should include all firms with 25 employees or less, or those with gross national annual receipts under \$1,000,000.

Small Business overall shall extend to those firms with up to and including 100 employees or 5,000,000 in annual receipts.

A complete economic impact study must precede any changes in the SBA Size Standards.

An update of the standard industrial classification system must be executed.

Separate standards for loans and procurement should be eliminated.

Employees should be defined on the basis of 1,800 hours worked annually.

SBA inherently creates an internal competition and artificially intervenes in the market place of its own assistance when such a large market is eligible for small business status. To adjust the 'ceiling' of small business downward is to select a more appropriate market and hopefully target assistance more efficiently.

Procurement and compliance with the set aside program is a very important element of the size standard question. Billions of procurement dollars that are funnelled to small businesses every year go to firms that are on the large end of any industry's size definition. As this level is brought down, it is important that the same procurement goals be met.

FOREIGN CORRUPT PRACTICES ACT

Small businesses have been discouraged from exporting goods and services because of the Foreign Corrupt Practices Act, passed in 1977. The intent of this law was to stop the practice of bribing foreign officials to get contracts, a practice common almost everywhere in the world outside the U.S. The law succeeded in curbing corruption, at the same time however, it made U.S. exporters uncompetitive in the world market. Its ambiguous language and burdensome record-keeping requirements have further frightened off the "would-be" American exporter.

At a time when not only small business, but the American economy as a whole could benefit from expanding markets overseas, SBSB feels that the death of bill H.R. 2530 which could have removed many of the stumbling blocks is a mistake. America must be competitive to be successful in overseas markets and several provisions of the present Foreign Corrupt Practice Act are clearly anti-competitive.

SMALL BUSINESS PROCUREMENT ACT OF 1983

SBSB believes that the Small Business Procurement Act of 1983 is needed to restrain the non-competitive nature of the Department of Defense and many procurement practices of the bureaucracy. The DOD has excluded participation from the small business community through lack of communication on bidding practices, procurement, and constricting cost effectiveness of doing business with the government. By passing the Small Business Procurement Act of 1983, it will assure that the confusion that now exists in administrative practices will diminish. This will enhance the opportunity for all members of the private sector to compete and bid on government order agreements and contracts.

SBSB is in strong support of any piece of legislation that will strengthen the future potentials of the private sector.

PATENTS

A U.S. patent grants an individual exclusive rights to market his/her products for 17 years. Once the patent expires, it is open to other manufacturers for production. The testing and review required of some new products under federal law can take up to eight or nine years.

The Patent Term Restoration Act would extend some patents by as much time as it took to conduct the tests, up to seven years. SBSB supports reform of the patent laws as a boost to research and development intensive companies and individual inventors. We also support the strengthening of the Patent Office itself. Too many inventors lose costly court battles unjustly. This is discouraging the very concept in which America was built.

10% WITHHOLDING TAX

SBSB wants Congress to repeal the 10 percent withholding tax on dividends and interest that will go into effect July 1, 1983. This tax will result in a lower yield on savings and it will be a burden to banks and corporations. In turn these business institutions will pass the costs to savers and investors. Banks and corporations will face additional paperwork that will increase the costs of doing business with banks specifically small business.

SBSB strongly opposes the 10 percent withholding tax on dividends and interest.

BANKRUPTCY REFORM ACT

There are more than 700,000 cases currently pending in the federal bankruptcy courts. These cases involve more people, money, jobs and tax revenues than the combined total of all civil cases pending before the remainder of the Federal Judiciary.

Litigants involved in bankruptcy proceedings now face costly delays and increased attorney fees in a system where swift judicial action is essential for both debtors and creditors, and any court order obtained will still be subject to constitutional and jurisdictional challenge. This also effects the flow of capital, jobs, and the ability to make quick decisions on adequate protection of collateral and on foreclosures authority.

The present bankruptcy courts fail to take into regard the small firms that are being put out of business by their decisions. The debtors future income is not taken into account therefore the cash flow of small creditors is being shut off. SBSB finds this practice devastating for the small business person which is most often the unsecured lender eliminated from a bankruptcy filing.

OFFICE MACHINE AND EQUIPMENT RETAIL DEALERS AGREEMENT ACT

SBSB opposes H.R. 7106, the Office Machine and Equipment Retail Dealers Agreement Act, because it allows established office equipment dealers the right to impede, through the federal courts, the entry of new dealers into their territory. The terminology of the bill was vague enough to include not only office equipment dealers, but dealers of any "any physical object or office machine software used in an office environment."

SBSB opposes the passage of any regulation or law that discourages open and free enterprise. H.R. 7106 is an example of an anti-free enterprise measure that will interfere with businesses ability to reach its market by expansion or change in direction.

SALES REPRESENTATIVE PROTECTION ACT

The Sales Representative Protection Act is a bill that is intended to protect independent representatives, but in actuality it will hurt sales representatives by constricting their flexibility to conduct business.

In too many ways, the Congress tries to control and regulate business, instead of letting the free enterprise system perform. Thousands of independent representatives would bear increased costs under this "red tape" proposal.

SBSB disagrees with Congressman Florio's position on H.R. 3496. SRPA may have good intentions overall, we believe that the bill will burden the fair principals and interfere with the mutual understanding sales representatives and manufacturers have established. This piece of legislation will bring more government intervention into the private sector.

SMALL BUSINESS PARTICIPATING DEBENTURE

The Small Business Participating Debenture (SBPD) would be a debenture where the lender would receive a stated rate of interest and a share of the earnings of the business during the period that the debenture was outstanding. The investor would be permitted to share in the fortunes of the business in much the same way as a traditional stockholder, but participation would terminate when the debture is paid off rather than continuing indefinitely.

This idea should provide a significant incentive to bring debt capital into small business on terms which are attractive to an investor and acceptable to the typical borrower. Capital gains treatment to the lender on the share of earnings payments and a tax credit for investing in an SBPD. The small business would be entitled to view both the interest and the share of earnings payouts as a cost of capital and deduct both of them as ordinary interest.

SBSB supports formation of the SBPD to provide a source of capital for small business.

National Family Business Council Inc.

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A PRESENTATION TO THE UNITED STATES SENATE COMMITTEE ON SMALL BUSINESS ON:

THE LEGISLATIVE PRIORITIES OF THE NATIONAL FAMILY BUSINESS COUNCIL

25 February 1983

Prepared by: Suzanne L. Nordblom
Government Affairs Chairman

Presented by: Philip W. Moore, Jr., President

Good morning.

My name is Philip W. Moore, Jr., I am Executive Vice-President of First Research Consultants, an economic, marketing and management consulting firm based in Miami, Florida. I am also the President of the National Family Business Council, a Washington-based business association dedicated to the interests of family-owned commercial enterprises.

I am accompanied by Robert R. Statham, an attorney practicing in Washington, D.C. Mr. Statham serves as General Counsel for the National Family Business Council (NFBC).

On behalf of the NFBC, it is my pleasure to express our appreciation for this opportunity to present to you our views on those issues we feel to be of primary importance to the future of family and small business. To expand briefly on our organization, the NFBC is dedicated to the perpetuation of family business within our free enterprise system, and, to maintaining a strong private sector in our economy by promoting the free enterprise system and true capitalism in our democracy.

With these premises in mind, the National Family Business Council currently maintains positions on four primary issues which we firmly believe demand immediate attention from the Congressional and Executive Branches of our government. They are: 1) Small Business Recovery; 2) Reform and Simplification of Corporate Taxation; 3) Estate and Gift Tax Reform; and 4) Social Security Reform.

An association dedicated to the interests of family-owned commercial enterprises.

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REGARDING SMALL BUSINESS RECOVERY

We firmly believe that it will be small business people and their financial supporters who will set the pace for our country's economic recovery. We also know that the 98th Congress and the Executive Office have tremendous power to help or hinder that pace. The big businesses of our country have a considerable amount of clout in the White House so why doesn't small business? We feel that it is time for the White House to employ a full-time small business advisor on its staff. We are not suggesting that a cabinet post be created, but since small business firms account for nearly all new employment created in the private sector and employ 50% of our country's working force, they very nearly are deserving of such attention from the Executive Office.

We also recommend the enactment of a "Small Business Employment Tax Act." The act would be centered on a general job tax credit; one that would encourage the creation of permanent jobs in the labor intensive parts of the private sector, by serving as an incentive bonus given to businesses employing more people in one calendar year than in the previous year. Applying the credit to payroll, rather than to income taxes would make the incentive most attractive to the newest and smallest companies. Remember that when small companies want to hire people, they usually don't have the cash flow to do it.

The second provision of the "Small Business Employment Tax Act" would be a training tax credit. It could perhaps be linked to the Job Training Partnership Act of 1982. When employees have been technologically replaced it is not probable that they can be rehired doing what they did before.

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The third provision of the Act is the cutting in half of the federal tax on capital gains, resulting from investment in small business. Small businesses need the equity capital that this type of legislation would attract.

REGARDING CORPORATE TAXATION

We believe that reform and simplification of corporate taxation is in order, and we are pleased about the study Senator Bod Dole's finance committee has undertaken regarding such reform. As it exists today the federal income tax is too complex to fully understand, placing unintended burdens on our nations taxpayers. Unreasonable tax rates destroy incentives and restrict investments so important to small business' economic growth. The Tax Equity and Fiscal Responsibility Act of 1982 makes major strides toward correcting these problems, but more needs to be done. We recommend that further attention be given to 1) the relationship between the tax-free incorporation provisions and the corporate reorganization provisions, 2) the treatment of net operating losses in corporate acquisitions, and 3) taxable and tax-free corporate acquisitions and dispositions.

REGARDING ESTATE AND GIFT TAX REFORM:

The Generation Skipping Transfer Tax is a deterrent to the perpetuation of small and closely held business. Because of its complexity, cost and negative impact on capital retention, we find it counterproductive. The stated intention of taxing property as though it had been transferred outright has not been achieved. The law attempts to presuppose the sequencing of generations, and

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in doing so, compounds the confusion. Distrust and misunderstanding of the law has resulted in individuals not properly using trusts to protect their families from uncertain and most likely inflationary futures. The problems of the Generation Skipping Transfer Tax cannot be remedied through regulations or by tinkering with the law. Repeal is in order.

Although the estate tax revisions provided for in the Economic Recovery Act of 1981 provide for an increase in the Unified Credit, one cannot assume that this will result in lower tax bills or a substantial reduction in total estate expenses. As a result of inflation and economic growth, the new graduated scale Unified Credit may not be adequate to eliminate the Federal Transfer Tax for many estates now valued under \$600,000. The National Family Business Council will be working towards further reform of Estate Taxes!

As a corollary to this, the NFBC is studying opportunities which may exist for changes in government regulations and practices that involve the fair market valuation of closely held companies and common stock in the estate of an owner or major shareholder in a small or family business in transition.

We may come back later to this Committee for help or support on this issue, which is crucial to the orderly and successful transition of a family business into the hands of succeeding generations.

REGARDING SOCIAL SECURITY REFORM

It is imperative to small businesses that the Social Security system be saved, and that Congress take immediate steps to make those life-saving reforms.

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When Social Security was initiated it was intended to serve as a retirement supplement for workers, and perhaps it is time to rethink the system in those terms. Presently, small business views social security as a tax on labor. Because of the nature in the structure of a small business, the Social Security payroll tax places a disproportionate burden on them. Being more labor intensive than large business, the small business pays an average lower wage. And because they are so labor intensive and competitive, they are not able to easily shift their tax burdens. They cannot pass product price increases or cost of labor increases on to their customers or back to their suppliers. Any increase in the Social Security tax right now will only subtract from any incentives for small businesses to create new jobs.

Employees of small businesses are also less likely than employees of large businesses to participate in pension plans or incentive programs to put money into retirement programs. They are therefore more likely to depend on Social Security as their primary source of income. We urge you to initiate substantial reduction in future retirement benefits, and to place an immediate freeze on the annual cost of living adjustment to help save this system. It is important to our country's retirees.

In closing, let me say again that we appreciate this opportunity to be here, and to offer our views on our four priority legislative issues: a) Small Business Recovery; b) Reform and Simplification of Corporate Taxation; c) Estate and Gift Tax Reform; and, d) Social Security Reform.

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In reiterate, these are the elements on which we believe the economic recovery and growth of our country depends, and the National Family Business Council will remain dedicated in pursuing such reforms. For the future, the NFBC is also looking toward playing a stronger role in publicizing the full value of family business within our economic free enterprise system, and within our economy as a whole. Later we may come back to this Committee to seek your help and support in this endeavor.

We offer to you, of course, the services and cooperation of our organization to further assist you in any way possible.

Thank you.

STATEMENT
OF
DR. GENE BOTTOMS
EXECUTIVE DIRECTOR
OF THE
AMERICAN VOCATIONAL ASSOCIATION

BEFORE THE
SENATE SMALL BUSINESS COMMITTEE

CHAIRMAN
THE HONORABLE LOWELL P. WEICKER

FEBRUARY 25, 1983

Mr. Chairman and members of the committee, I am Gene Bottoms, Executive Director of the American Vocational Association. I am pleased to be able to speak to you today on behalf of the 50,000 vocational educators who make up the membership of AVA.

The field of vocational education has a close working relationship with many small businesses throughout America and we are seeking ways to work even closer with small employers to raise the skill levels of the local workforce.

I want to bring to your attention the proposed three-hundred million dollar reduction in federal funds for vocational education in FY84, and the eventual phasing out of federal support altogether, will result in a reduction in the skill endowment level of workers in small business, as well as, in the growth of small businesses.

First, small businesses are more dependent upon other institutions to provide pre-entry, retraining and upgrading preparation for their employees than are businesses large enough to have their own training capacity. It is too costly for small employers to invest in training only to have the individuals employed by a larger company.

Second, advancing technologies are requiring many small businesses to utilize new technologies in order to survive. Yet, survival is dependent upon retraining of existing employees and a supply of new workers prepared with the understanding and skills of the new technologies. Federal dollars have been a major force in keeping vocational programs current with demands and requirements of the workplace. Removal of federal dollars will reduce the capacity of local communities to provide quality vocational education programs.

Third, the survival of many small businesses is already weakened by a shortage of advanced level skilled and technical workers. A recent survey of twelve-hundred metal precision firms indicated the inability to employ advanced level workers as their major problem as the economy improves. Rather than reducing federal investment we should be looking at policies and levels of investments required to raise the technical skill endowment of the nation's workforce.

Finally, a reduction in quantity and quality of vocational education could well impact on the growth of small businesses. for example, a recent nationwide study conducted by the National Center at the Ohio State University found that 6 percent of those high school graduates who had a major concentration of vocational education were self-employed, as compared to 3 percent of high school graduates in general. Individual with modern technical knowledge and skills are potential creators of small businesses.

My request would be that the Committee express the importance of vocational education to economic growth of small business by:

1. requesting the Budget Committees to remove the \$735 million budget ceiling placed on vocational education in the Budget Act of 1981.
2. pursuing an increased appropriation for vocational education in 1984 to be directed toward aiding states to update programs in terms of advancing technology, to retraining unemployed adults and upgrading the skills of existing workers, faced with changing work requirements, and to increase access and success of handicapped and

disadvantaged students in mainstream vocational education programs.

3. working with the Education and Labor Committee to reauthorize permanent vocational education legislation in which the federal focus should be defined in terms of excellence and equity.

Strengthened federal initiatives should be given to creating a closer cooperation, especially between small business and vocational education at the local level, to assure that programs reflect the demands and requirements of the workplace. Further, the new legislation should encourage states to make greater and earlier use of its vocational education resources in providing retraining opportunities for the unemployed.

National
Audio-Visual
Association, Inc.

3150 SPRING STREET • FAIRFAX, VIRGINIA 22031 • (703) 273-7200

February 25, 1983

TO: SENATE SMALL BUSINESS COMMITTEE

FROM: Kenton Pattie
National Audio-Visual Association

TOPIC: HOW TO STOP THE GOVERNMENT FROM HELPING NON-PROFITS COMPETE
AGAINST COMPANIES

PROBLEM: Through grants and contracts, Federal agencies fund non-profits. Using portions of their Federal money, these non-profits create products and services which compete with those offered by private companies.

EFFECT ON SMALL BUSINESSES: Small firms find it difficult, and often impossible, to compete successfully with non-profits. Propped up with Federal funds, non-profit tax status, non-profit mailing rates and other public support, these non-profits have a distinct competitive edge. They carry into the marketplace the prestige of the Federal government and in some markets buyers interpret the Federal "grant" or "contract" as a signal that the Federal government has endorsed the product or service.

RECENT DEVELOPMENTS: Small firms are reporting increased competition from non-profits. The economic pressures on non-profits have encouraged them to move into "business opportunities" which generate a profit.

PROPOSED SOLUTIONS:

1. Legislation that will prohibit Federal funds from being spent by any grantee or non-profit contractor to create a product or service which competes with a product or service offered by small business.
2. Change in OMB Circular A-76 to prohibit non-profits from competing head to head with private firms.
3. Tightening of the tax and postal laws to reduce the competitive advantage non-profits enjoy when doing business.



PRINTING INDUSTRIES OF AMERICA, INC.

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Government Affairs
Department

TESTIMONY OF
THE PRINTING INDUSTRIES OF AMERICA
AND
THE NATIONAL ASSOCIATION OF PRINTERS AND LITHOGRAPHERS
BEFORE THE
SENATE SMALL BUSINESS COMMITTEE
ON
LEGISLATIVE PRIORITIES FOR THE 98th CONGRESS
FEBRUARY 25, 1983

For Additional Information Contact:

Benjamin Y. Cooper
Vice President
Government Affairs

Mr. Chairman and members of the committee, my name is Benjamin Y. Cooper. I am Vice President of Government Affairs for the Printing Industries of America. PIA appreciates the opportunity to contribute to this special meeting of the Senate Small Business Committee. Our association represents nearly 11,000 firms in the graphic arts industry, and is comprised of companies as small as one-person composition firms as well as billion dollar companies with thousands of employees. More than 80% of our member companies are considered small businesses. The printing industry as a whole consists of over 50,000 companies, and the average company has fewer than 25 employees. While printing is the nation's seventh largest manufacturing industry, it is the largest in terms of number of establishments. Our comments today are also presented in behalf of the National Association of Printers and Lithographers, representing nearly 3,000 graphic arts companies.

While this presentation will focus on a number of legislative and regulatory issues of great concern to the printing industry in the 98th Congress, I would like to focus particular attention on a Government Printing Office (GPO) procurement system known as the multiple award term procurement program and explain some of the unique problems it presents to printers.

The GPO operates the most successful small business procurement program in the federal government. More than 9,000 printers compete on a regular basis for GPO contracts. In 1982, 72% of all GPO work was contracted out and over 93% of the contracts were awarded to small businesses. The GPO operates a successful regional procurement system which assures that printers in every state have an opportunity to bid on government printing jobs.

Multiple award contracts amount to a large number of awards of varying sizes, ranging from a few hundred to tens of thousands of dollars. The GPO generally uses this form of procurement to obtain printed materials only when it anticipates that one particular firm may not be able to meet all the requirements of a job.

In using this system, the GPO invites bids from numerous printers for the production of specially manufactured items. The invitation indicates that multiple awards are contemplated and asks for prices from each bidder. This information is then compiled in a schedule of prices. In placing work, the GPO is obligated to offer each job to the low contractor first, the next lowest contractor second, and so on until the job has been accepted. Due to the urgency of the work offered, offers are made by telephone and the printers must reply within one hour as to whether or not they can accept the offer. For the most part, this system operates smoothly and efficiently. However, one major hitch in this system proves to be a burden to an increasing number of printers. The Labor Department has determined that awards made under multiple award schedules, whether above \$10,000 or not, are subject to the overtime provisions of the Walsh-Healey Act. (The Walsh-Healey Act requires the payment of overtime for all hours over 8 worked in one day when the work is on a federal or federally assisted project of over \$10,000.) There are two reasons for this interpretation. First, the entire multiple award procurement is above \$10,000 even though the portion of the work going to an individual company may be below this amount. These multiple award procurements are not synonymous with a large contract with numerous subcontractors. In the subcontract arrangement there is an identifiable award. In multiple award procurements, many printers provide varying portions of the contracts. None of the printers is concerned with, or in most cases even knowledgeable about, the total of the multiple awards in a contract. Second, the Labor Department has suggested that printers enter the multiple award schedule with an expectation of receiving more than \$10,000 in government work. Neither of these arguments is applicable to small printers.

As many small printers discover the potential benefits of the compressed work week (which is well suited to the printing industry), they find they can no longer

be competitive on federal work because of the overtime costs they are forced to incur. The choice is then between dropping the compressed work schedule or dropping the federal work. Since compressed workweeks enjoy so much popularity among employees, it is the easier choice to forego government work.

One printer avoided this choice by lowering the hourly wage for his employees so that he could retain both his compressed workweek and government contracts. He meets the requirement of Walsh-Healey by paying overtime after 8 hours per day, but because of the lower hourly wage, the weekly wage remains the same. What purpose did the Walsh-Healey Act serve in this instance? It created a complicated and costly accounting procedure for a small business and did nothing to promote the interests of either the employer or employees. The cost for this printer to set up the new system was \$30,000. He has in the three years since this episode virtually eliminated government contracts. Incidentally, this unique payroll system was recommended by the U.S. Department of Labor.

Throughout private industry, many companies are discovering that a compressed work schedule can lower production costs and increase productivity while meeting with a high degree of employee satisfaction. Compressed workweeks do not work for everyone, but where business or industry requires long production runs to maximize productivity and incurs expensive startup and shutdown costs each day, compressed workweeks seem to be particularly effective. Printing is one industry well suited to the compressed work schedule.

The acceptance of the compressed workweek in our industry has been very broad and includes both union and open-shop work forces. The Graphic Arts Employers of America, representing PIA's unionized members, reported 11 collectively bargained compressed workweeks out of 300 agreements on file in 1982. Of these firms, the standard compressed schedule is in fact not a 4-day 10-hour workweek,

but a 3-day 12-hour schedule. These 11 firms no longer have the economic option of accepting government contracts.

Other industries as well are seeing tremendous gains in the use of compressed workweeks. The Associated General Contractors noted that at least 38 collective bargaining agreements in the construction industry provide for compressed work schedules. According to the National Council for Alternative Work Patterns, several industries make substantial use of compressed workweeks-- service workers (6.7%), transportation equipment operators (4.4%), local public administration (10.8%). Over 32 states have established compressed workweeks in selected agencies, not to mention the more than 175,000 federal employees working compressed schedules (aside from those using flexitime).

Other countries long ago learned of the benefits of compressed work schedules. In West Germany alone over 30% of the work force operates on a compressed schedule.

I could spend a great deal of time discussing the merits of compressed workweeks. However, the obvious fact is that, while they are not for everyone, compressed workweeks offer many industries and employees an attractive, cost reducing, productivity boosting work schedule, and they are growing, not declining in popularity. Unfortunately, as they grow they will reduce the pool of available government contractors, resulting in less competition and greater costs for the taxpayers.

The obvious solution is not to outlaw compressed workweeks, but to update the Walsh-Healey Act so that federal contractors can enjoy the same work scheduling flexibility as the private sector. It is our hope that the Senate Small business Committee can devote some attention to the issue of the compressed workweek, and particularly to its impact on a small business that might do occasional government work. We see the problems that Walsh-Healey causes every day for small printers

at the GPO, and we know that these problems occur in many other agencies and industries as well.

In addition to the GPO, the federal government maintains some 350 additional printing operations. These facilities range from small duplicating facilities to major printing enterprises. With the rare exception of a top secret printing requirement, all the work handled in these facilities could be procured from private sources.

The examples of flagrant competition by these additional shops are almost endless. Printing is the Washington metropolitan area's largest manufacturing enterprise. Yet, the federal government finds it necessary to maintain 50 printing plants. In New York City, the GPO field facility is literally surrounded by printing companies. In addition to the GPO facility in New York, the federal government operates seven other facilities.

The situation for the printing industry is particularly frustrating because virtually every inquiry into the area of government printing has pointed to the waste and duplication associated with these facilities, and to the fact that work procured was cheaper than work done in-house.

Printing should be a particular thorn in the side of Congress because federal government printing is essentially a legislative branch enterprise. The GPO is a legislative branch agency. Policies at the GPO and the authorization of printing facilities for the entire federal government (with some statutory exceptions) are the responsibility of the Joint Committee on Printing. Consequently, while we may fault the agency for requesting the equipment to establish a printing facility, the approval is given on a case-by-case basis by the JCP. To its credit, the present JCP is considerably more aggressive in its review of federal printing facilities and has in fact refused to reauthorize a number of plants in the past few years. Unfortunately, the current activity is too late and too slow. Frankly,

we want the federal government-- both the legislative and executive branches-- to stop doing work that can be done more efficiently and at a lower cost by the private sector.

Our problem is that federal printing is on a seemingly endless cycle of growth. First, a small duplicating facility is set up to do "quick and dirty" work. The equipment is replaced by more sophisticated equipment and more sophisticated employees are hired to operate it. The increased capacity increases the demands on the equipment, so more equipment is requested. The next step is higher technology, such as sophisticated phototypesetting equipment. Rapid technological change in the printing industry also tends to promote more in-house activity as federal agencies investigate and seek approval for the purchase of new equipment capable of producing commercial-quality work. Each purchase takes more work out of the commercial sector, but, worst of all, such purchases freeze technology for that agency. If the agency bought the services commercially, it could seek out the most advanced contractor. Subsequent contracts could advance to higher technological formats. Buying the equipment, however, means the agency will remain wedded to that technology until new equipment can be purchased.

The problems seem endless. As an industry organization, we spend considerable time in the watchdog role, making sure the JCP has not authorized unnecessary equipment at one agency or another, or that wage negotiations at the GPO do not force private sector employees to push for higher wages to "catch up" with the government, or that the GPO procurement system remains fair. We would prefer that Congress bring a halt to the competition, particularly in an area directly under its control.

We propose that Office of Management and Budget management directive A-76 be made law. Printing is currently exempt from coverage, so legislation would be necessary to apply the directive to the GPO and all federal printing. Further,

acceptable costing standards for the federal government must be established to assure equitable public and private cost comparisons. We also urge Congress to determine the level of printing to be performed by the GPO and restrict printing to that level. Other agencies' printshops should be allowed to operate only when the work performed in these shops cannot be procured or when matters of national security require in-house production. This issue has continued with little change for years. We urge you to end this competition as soon as possible.

The small generator exemption to the Resource Conservation and Recovery Act regulations dealing with hazardous waste disposal will be a major concern to the printing industry in the 98th Congress. Under current law, generators of less than 1000 kg of hazardous waste per month are exempt from regulation. The Environmental Protection Agency determined in 1980 that the 1000 kg/mo cutoff would effectively regulate almost 99% of all the nation's hazardous waste disposal.

As the Small Business Committee is aware, attempts were made last Congress to lower the current regulatory exemption to 100 kg/mo or possibly eliminate it altogether. The legislative efforts were continued even after the EPA initiated a two-year study of alternative methods for regulating small quantity producers of hazardous waste. The study is analyzing the types and quantities of waste generated, and the availability to small firms of appropriate waste sites. All these are unknown factors at the moment.

The small printer would have tremendous difficulty in identifying every ingredient in the various chemicals and inks that are the everyday tools of the trade. Many ingredients in inks, for example, are withheld as proprietary information by the manufacturer. With the dramatic reduction or elimination of the small generator exemption, small printers would experience considerable difficulty.

The printing industry recognizes its responsibility to the nation's effort to maintain clean air and clean water. We will strive to limit any contribution we are making to environmental problems. There are, however, practical problems that must be addressed. We are unable, for example, to obtain information on the availability of approved disposal sites for hazardous wastes. It is our understanding that there are many areas of the country that have no disposal facilities. Also, there is not an adequate number of approved carriers of solid waste. A small business generating one 55-gallon drum of waste material per month (roughly the equivalent of the proposed 100 kg/mo cutoff point) may have to store the waste for several months before the it can be removed.

PIA urges this committee to play a leadership role in highlighting the concerns of small business people about the removal of the small generator exemption. As members of this committee I know you are quite aware of the special problems that small businesses often encounter in the regulatory area. Help us to better understand the hazardous waste problem by allowing EPA to complete its study before any additional regulations are placed on small generators.

Obviously, the Social Security issue moves to the forefront of legislative action this Congress. While PIA is generally supportive of the reform package produced by the President's Commission, we feel that any final package should include an increase in the retirement age as an additional cost-cutting measure.

PIA is also adamantly opposed to general revenue financing of the system. I would like to note that a "starting point" proposal circulated by members of the House Social Security Subcommittee just this week includes a proposal to allow Social Security trust funds to borrow from the Treasury if current measures prove inadequate to save the system. This is not the kind of initial proposal that the small business community hoped to see from the House.

PIA's small printers are no different than small businesses in other industries who want to see adequate solutions to the current Social Security financing problems without the burden of not only greater Social Security taxes, but greater federal taxes as well.

In its proposed 1984 budget the Administration proposed a cap on tax-free employer-paid health care insurance premiums. The proposal would tax employer-paid health premiums in excess of \$2100 per year, or about \$175 per month per family. The limit on individual plans would be \$840 per year, or \$70 per month.

The Administration feels this proposal would encourage more cost consciousness in health coverage. Unfortunately, the individual employee has little or no choice in the type of employer-paid coverage he or she receives. The result will be a tax increase for those who can least afford any additional costs at this time.

Large employers have more flexibility to shop around for a less expensive plan, while small businesses will be disproportionately affected by this rule. Small businesses have fewer affordable group plans to choose from because of the smaller size of their work force.

The Administration also wants self-insurance programs to be taxed in this same way. This would create a regulatory nightmare in trying to determine tax liability for an individual, since no premiums are paid under a self-insurance plan. Would a catastrophic illness under a plan of this kind result in increased taxes for fellow employees?

PIA urges the Congress to reject this proposal as work on the 1984 budget proceeds.

Once again, the small business community is threatened by the possible adoption of onerous changes in Section 385 of the Internal Revenue Code, which would redefine debt and equity for tax purposes. If the Treasury Department repropose these regulations on April 1, 1983, as expected, PIA hopes that swift congressional action to reverse this decision will follow.

As this committee is aware, these regulations would have a tremendous impact on small, closely held corporations with fewer than 5 shareholders. Obviously, quite a few printers and other small businesses fall within this category. PIA feels these regulations would stifle the success of many new businesses and would work directly contrary to the Administration's efforts to build an economic recovery.

The inordinately high cost of natural gas in recent months, in spite of an adequate supply, is causing a severe strain on all gas users. In addition to their general heating requirements, certain printers use large quantities of gas to fuel ink drying equipment on large web offset presses. These printers are understandably sensitive to high natural gas prices, particularly when they stem from unfair contract clauses which deny the public the benefits of a competitive market place.

PIA will be active in legislative efforts during this Congress to restructure the present contract arrangements.

Mr. Chairman, I have discussed a range of issues that will be of great concern to the printing industry during this session of Congress. But I believe these issues go beyond just the focus of printers. The issues of Walsh-Healey, federal procurement, hazardous waste, health benefits, natural gas prices and

the others I have discussed affect the entire small business community. I urge this Committee to play an active role in promoting the interests of small business as each of these issues is debated in Congress.

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THE NATIONAL ASSOCIATION OF RETAIL DRUGGISTS

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Seven minutes from the Nation's Capitol

STATEMENT

OF

WILLIAM E. WOODS

EXECUTIVE VICE PRESIDENT

THE NATIONAL ASSOCIATION OF RETAIL DRUGGISTS

BEFORE THE

COMMITTEE ON SMALL BUSINESS

U. S. SENATE

ON

SMALL BUSINESS PRIORITIES FOR THE 98TH CONGRESS

98TH CONGRESS

February 25, 1983

STATEMENT OF THE NATIONAL ASSOCIATION OF RETAIL DRUGGISTS
BEFORE THE COMMITTEE ON SMALL BUSINESS
U. S. SENATE

February 25, 1983

INDEPENDENT PHARMACY'S PRIORITIES FOR THE 98TH CONGRESS

Mr. Chairman, Members of the Committee:

I am William E. Woods. I serve as Chief
Executive Officer of the National Association of Retail Druggists.

The National Association of Retail Druggists (NARD) represents owners of more than 30,000 independent pharmacies, where over 75,000 pharmacists dispense more than 70 percent of the nation's prescription drugs. Together, they serve 18 million persons daily and provide nearly 90 percent of the Medicaid pharmaceutical services. NARD has long been acknowledged as the sole advocate for this vital component of the free enterprise system.

NARD members are primarily family businesses. They have roots in America's communities. The neighborhood independent druggist typifies the reliability, stability yet adventuresomeness that has made our country great.

As owners of independent pharmacies, our members are committed to legislative and regulatory initiatives designed to provide them a fair chance to compete. We especially appreciate the opportunity to appear before the Committee to present testimony on NARD's small business priorities for the 98th Congress. We would like to express our special appreciation to the Committee, Chairman Weicker, Senator Nunn, and staff for the extraordinary cooperation that you have shown NARD in the planning of this important hearing.

NARD

Statement before the Senate Small Business Committee
February 25, 1983

The independent community pharmacist of today is simultaneously a health care professional and a small businessperson. NARD and its members vigorously support the American free enterprise system which provides the only meaningful climate under which a small business can economically survive, have the opportunity to succeed through personal efforts, and perform an important and essential service to the community.

The elimination of unfair competition with independent pharmacies is an essential component of our agenda for the 98th Congress. Especially obnoxious is unfair government competition. It is our position that no small business should tolerate a government allocation of their taxes for projects that unfairly compete with the very sources of the tax revenue: business generated by enterprising independent retail pharmacists.

The Veterans Administration's mail order prescription drug program, which denies veterans the freedom to choose a convenient independent retail pharmacy to provide their pharmaceutical services and products, is a glaring example of such government competition. We urge the Senate to support legislation such as H.R. 608 introduced by Congressman Hammerschmidt which would provide freedom of choice and provide the veterans the quality of services to which they are entitled. After all, welfare recipients are guaranteed such freedom.

NARD
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February 25, 1983

Equally invidious unfair competition in the private sector is high on NARD's agenda for the new Congress. In the strongest possible terms our members urge the Committee to do all within its power to improve the enforcement of price discrimination and other antitrust laws by both the Federal Trade Commission and the Department of Justice. Of special concern is unfair competition from the sale of prescription drugs by private non-profit hospital pharmacies to non-hospitalized patients.

We had every intention of emphasizing our related concerns raised by claims of exemption from the Robinson-Patman Act because of a pharmacy's affiliation with state or local government. I am pleased to report, however, that Wednesday the Supreme Court announced a landmark decision concurring with NARD's position that the price discrimination practices of the Robinson-Patman Act extended to the sale of pharmaceutical services and products to state and local government pharmacies for resale in competition with NARD members!!!

We do urge the Committee to consider oversight hearings on the enforcement of this decision and the Portland Retail Druggists case which held that pharmacies could not use the Non-profit Institution Act as a shield from the Robinson-Patman Act.

Mr. Chairman, I submit for the record a copy of these two decisions as well as our own extensive brief on this matter.

We urge the Committee to consider earmarking of FTC and Justice Department budgets for enforcement of Robinson-Patman as well as vigorous oversight. Additionally, we suggest serious review of proposals for SBA programs which would assist small business, victimized by price discrimination, to have their day in court.

NARD

Statement before the Senate Small Business Committee
February 25, 1983

We pledge to assist the Committee in accomplishing any of the following objectives sought by NARD in the 98th Congress:

- Protection of pharmacy owners, employees, and customers by making the robbery (violent taking) of controlled drugs from pharmacies a Federal offense. Presently, non-violent theft of these substances (e.g., forgery, possession without a prescription, etc.) are serious Federal offenses. The 1980 hearing this Committee held on the subject was vital to the strong interest eventually expressed by the Senate for this legislation.
- To allow pharmacists to negotiate collectively with private and governmental health-care program administrators for fair reimbursements for drug products provided as well as a realistic dispensing charge. We request a hearing on this critical matter and suggest that the 1971 "Third Party Prepaid Prescription Program" Report and Recommendation of the House Small Business Committee be endorsed and updated.
- To oppose advancing scheduled Social Security tax rate increases for 1983-1990; to support a six-month delay in the 1972 cost-of-living-adjustment; to discourage early retirement and gradually increase the age for full retirement to 68 by at least 1990. Scheduled increases are already perceived by many as the "straw that breaks the camel's back. Optimunly, we would support a repeal of the 1985 and 1990 scheduled increases in the tax rate.

NABD

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Adding to this existing burden is in our view ludicrous. Small businesses generate jobs. Strong small businesses make a strong economy. Additionally, tax on labor will only increase present record levels of unemployment. Therefore, along with most small businesses, we reject reforms based on increasing the cost of hiring and retaining employees.

- To revise the labor laws reinstating the youth differential minimum wage for youths 16 to 18.
- To keep intact the 1981 Estate Tax Reform which reduced the estate tax burden on owners of independent retail pharmacies by increasing the estate tax exemption from \$175,000 to \$600,000.
- To "rollover" capital gains resulting from the sale of an investment when reinvested in small businesses.
- To simplify inventory accounting for small businesses.
NABD is a member of the Inventory Reform Task Force.
- To support the broadest possible availability of pharmaceutical services and products through expanded Federal reimbursement coverage or tax credits, for those who are provided care in their homes.
- To reduce Medicaid paperwork and to assure a cost-effective pharmacy program, support repeal of the fixed fee for services reimbursed (with its complex bureaucracy), and substitute marketplace prices for remittance. Marketplace prices would enable pharmacies to be reimbursed for the services and products supplied. Medicaid patients would benefit because more independent pharmacies would remain

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in business and available to provide products and needed services.

- To require prompt payment to health care providers in Federal programs, such as Medicaid. Perhaps this could be accomplished by adding an additional title to last year's prompt payment legislation which covered businesses who contract directly with the Federal government.
- To support the "FDA Approval Status Amendment of 1983" introduced by Senator Hatch as S.93 to help assure that independent retail pharmacists know whether or not a prescription drug has received FDA approval and can act accordingly to protect the public.
- To explore and address the various implications of last fall's Tylenol tragedies through:
 - Immediate efforts by the Food and Drug Administration and drug manufacturers to produce tamper-proof medication and packaging that will aid in controlling the introduction of dangerous and foreign substances into medications and that will alert consumers that the package has been opened previously;
 - An evaluation of the current distribution system for over-the-counter drugs to determine the safety and effectiveness of the current and future non-pharmacy retail outlets, with specific emphasis given to making pharmacist consultation and assistance available;

NABD

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- Federal regulations to require package labeling directing consumers to consult with their pharmacist regarding the use of potentially harmful over-the-counter medications in order to assure their proper use, efficacy, and safety; and
- The creation of a separate class of drugs, similar to the Canadian system, that may be dispensed only by pharmacists.

In the regulatory area, the Regulatory Flexibility Act should be vigorously enforced to assure that unnecessary existing rules and regulations are eliminated and that new proposals, are assessed for impact on small business, such as independent pharmacies; and appropriate action such as modification or withdrawal as was the case with the ill-conceived proposed Patient Package Insert Program. The rules and regulations of the Health Care Financing Administration are recommended as a suitable target for Committee oversight hearings.

Our members are major factors in the stability of their hometowns. They are not newcomers or employees on the ladder to stardom in some distant chain's hierarchy. They know their employees and customers. Often they provide the success models or symbols to young, and not so young, of proof that the American dream of ownership and hard work is still what this country is all about. They support religious endeavors and other local institutions. In other words, they are leaders with a stake in the community who have, and are demonstrating daily, a commitment to local and national pride. They learned long ago that "Big is not necessarily better!"

NARD

Statement before the Senate Small Business Committee
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All that they epitomize is under fire. Regretfully, the Federal Government (through actions or inaction) is firing most of the shots!

Uppermost, our members want to continue owning and operating their pharmacies, providing vital, personalized health-care services for each of our communities. NARD solicits your assistance in any mutual effort which will permit them to continue to control their own economic and professional destinies.

Once again, Mr. Chairman, on behalf of the independent retail pharmacy, we thank you for the opportunity to assist the Senate Committee on Small Business in preparing its agenda for the 98th Congress.

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

JEFFERSON COUNTY PHARMACEUTICAL ASSN. INC. *v.* ABBOTT LABORATORIES ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 81-827. Argued November 8, 1982—Decided February 23, 1983

Petitioner trade association of retail pharmacists and pharmacies filed an antitrust suit in Federal District Court against respondent pharmaceutical manufacturers, the Board of Trustees of the University of Alabama, which operates pharmacies in connection with its hospitals, and a county hospital pharmacy. Petitioner alleged that respondent manufacturers violated the price-discrimination proscriptions of the Robinson-Patman Act by selling their products to respondent hospital pharmacies at prices lower than those charged petitioners' members for like products, and that respondent pharmacies knowingly induced such lower prices in violation of the Act and sold the drugs to the general public in direct competition with privately owned pharmacies. The District Court granted respondents' motions to dismiss the complaint, holding that state purchases are beyond the Act's intended reach. The Court of Appeals affirmed.

Held: The sale of pharmaceutical products to state and local government hospitals for resale in competition with private pharmacies is not exempt from the Act's proscriptions. Pp. 3-20.

(a) The Act by its terms does not exempt state purchases, and the statutory language is sufficiently broad to cover governmental bodies. Thus, the Act's plain language strongly suggests that there is no exemption for state purchases to compete with private enterprise. Pp. 4-6.

(b) Such an exemption is not supported by the purposes of the anti-trust laws, including the Robinson-Patman Act. Those laws represent a carefully studied attempt to bring within them every person engaged in business whose activities might restrain or monopolize commercial intercourse among the States. And the Act's history does not reveal any legislative intention to enable a State, by an unexpressed exemption, to

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Syllabus

enter private competitive markets with congressionally approved price advantages. Pp. 6-11.

(c) Nor is respondents' contention that state purchases are outside the Act's scope clearly supported by subsequent legislative events (particularly the hearings on the Act held in the late 1960's) or by court decisions or the interpretations of commentators and executive officials. Thus, Congress cannot be said to have left untouched a universally held interpretation of the Act. Pp. 12-19.

(d) It is not for this Court to indulge in the business of policymaking in the field of antitrust legislation. The legislative history is replete with references to the economic evil of large organizations purchasing from other large organizations for resale in competition with small, local retailers. To create an exemption in this case clearly would be contrary to Congress' intent. P. 19.

656 F. 2d 92, reversed and remanded.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, MARSHALL, and BLACKMUN, JJ., joined. STEVENS, J., filed a dissenting opinion. O'CONNOR, J., filed a dissenting opinion, in which BRENNAN, REHNQUIST, and STEVENS, JJ., joined.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 81-827

JEFFERSON COUNTY PHARMACEUTICAL ASSOCIATION, INC., PETITIONER *v.* ABBOTT LABORATORIES ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[February 23, 1983]

JUSTICE POWELL delivered the opinion of the Court.

The issue presented is whether the sale of pharmaceutical products to state and local government hospitals for resale in competition with private retail pharmacies is exempt from the proscriptions of the Robinson-Patman Act.

I

Petitioner, a trade association of retail pharmacists and pharmacies doing business in Jefferson County, Alabama, commenced this action in 1978 in the District Court for the Northern District of Alabama as the assignee of its members' claims. Respondents are 15 pharmaceutical manufacturers, the Board of Trustees of the University of Alabama, and the Cooper Green Hospital Pharmacy. The University operates a medical center, including hospitals, and a medical school. Located in the University's medical center are two pharmacies. Cooper Green Hospital is a county hospital, existing as a public corporation under Alabama law.

The complaint seeks treble damages and injunctive relief under §§ 4 and 16 of the Clayton Act, 38 Stat. 731, 737, 15 U. S. C. §§ 15 and 26, for alleged violations of § 2(a) and (f) of the Clayton Act, 38 Stat. 730, as amended by the Robinson-Patman Act (the Act), 49 Stat. 1526, 15 U. S. C. § 13(a) and

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(f). Petitioner contends that the respondent manufacturers violated § 2(a)¹ by selling their products to the University's two pharmacies and to Cooper Green Hospital Pharmacy at prices lower than those charged petitioner's members for like products. Petitioner alleges that the respondent hospital pharmacies knowingly induced such lower prices in violation of § 2(f)² and sold the drugs to the general public in direct competition with privately owned pharmacies. Petitioner also alleges that the price discrimination is not exempted from the proscriptions of the Act by 15 U. S. C. § 13c.³

Respondents moved to dismiss the complaint on the ground that state purchases⁴ are exempt as a matter of law from the sanctions of § 2. In granting respondents' motions, the District Court expressly accepted as true the allegations that local retail pharmacies had been injured by the challenged price discrimination and that at least some of the state pur-

¹ Section 2(a), 15 U. S. C. § 13(a), provides in relevant part:

"It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States . . . , and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them. . . ."

² Section 2(f), 15 U. S. C. § 13(f), provides:

"It shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section."

³ Section 13c provides:

"Nothing in [the Robinson-Patman Act] shall apply to purchases of their supplies for their own use by schools, colleges, universities, public libraries, churches, hospitals, and charitable institutions not operated for profit."

⁴ "State purchases" are defined as sales to and purchases by a State and its agencies.

chases were not exempt under § 13c. 656 F. 2d 92, 98 (CA5 1981) (reprinting District Court's opinion as Appendix). The District Court held that "governmental purchases are, without regard to 15 U. S. C. § 13c, beyond the intended reach of the Robinson-Patman Price Discrimination Act, at least with respect to purchases for hospitals and other traditional governmental purposes." 656 F. 2d 92, 102 (1981). The Court of Appeals for the Fifth Circuit, in a divided *per curiam* decision, affirmed "on the basis of the district court's Memorandum of Opinion." 656 F. 2d, at 93.⁵

We granted certiorari to resolve this important question of federal law. — U. S. — (1982). We now reverse.

II

The issue here is narrow. We are not concerned with sales to the federal government, nor with state purchases for use in traditional governmental functions.⁶ Rather, the

⁵The District Court, and thus the Court of Appeals, agreed that "[t]he claims against the Board must . . . be treated as equivalent to claims against the State itself." 656 F. 2d, at 99. Accordingly, both courts held that the Eleventh Amendment bars petitioner's claim for damages against the University. Petitioner did not challenge this holding in its appeal from the District Court's decision.

⁶Respondents argue that application of the Act to purchases by the State of Alabama would present a significant risk of conflict with the Tenth Amendment and that we therefore should avoid any construction of the Act that includes such purchases. See *NLRB v. Catholic Bishop of Chicago*, 440 U. S. 490, 501 (1979). There is no risk, however, of a constitutional issue arising from the application of the Act in this case: The retail sale of pharmaceutical drugs is not "indisputably" an attribute of state sovereignty. See *Hodel v. Virginia Surface Mining & Reclamation Association, Inc.*, 452 U. S. 264, 288 (1981). It is too late in the day to suggest that Congress cannot regulate States under its Commerce Clause powers when they are engaged in proprietary activities. See, e. g., *Parden v. Terminal Railway*, 377 U. S. 184, 187-193 (1964). If the Tenth Amendment protects certain state purchases from the Act's limitations, such as for consumption in traditional governmental functions, those purchases must be protected on a case-by-case basis. Cf. *City of Lafayette v. Louisi-*

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issue before us is limited to state purchases for the purpose of competing against private enterprise—with the advantage of discriminatory prices—in the retail market.⁷

The courts below held, and respondents contend, that the Act exempts all state purchases. Assuming, without deciding, that Congress did not intend the Act to apply to state purchases for consumption in traditional governmental functions, and that such purchases are therefore exempt, we conclude that the exemption does not apply where a State has chosen to compete in the private retail market.

III

The Robinson-Patman Act by its terms does not exempt state purchases. The only express exemption is that for nonprofit institutions contained in 15 U. S. C. § 13c.⁸ Moreover, as the courts below conceded, “[t]he statutory language—‘persons’ and ‘purchasers’—is sufficiently broad to cover governmental bodies. 15 U. S. C. §§ 12, 13(a,f).” 656 F. 2d, at 99.⁹ This concession was compelled by several of this Court’s decisions.¹⁰ In *City of Lafayette v. Louisiana*

ana Power & Light Co., 435 U. S. 389, 413, and n. 42 (1978) (plurality opinion).

⁷ Special solicitude for the plight of indigents is a traditional concern of state and local governments. If, in special circumstances, sales were made by a State to a class of indigents, the question presented, that we need not decide, would be whether such sales are “in competition” with private enterprise. The District Court correctly assumed that the private and state pharmacies in this case are “competing pharmacies.” 656 F. 2d, at 98. See also note 8, *infra*.

⁸ The District Court properly assumed, for purposes of making its summary judgment, that at least some of the hospital purchases would not be covered by the § 13c exemption. See n. 3, *supra*, and accompanying text. Therefore, we need not consider whether this express exemption would support summary judgment in cases against state hospitals purchasing for their own use. See n. 20, *infra*.

⁹ The words “person” and “persons” are used repeatedly in the antitrust statutes. See 15 U. S. C. §§ 7, 12, 15.

¹⁰ See, e. g., *Georgia v. Evans*, 316 U. S. 159, 162 (1942) (state is a “per-

Power & Light Co., 435 U. S. 389, 395 (1978), for example, we stated without qualification that "the definition of 'person' or 'persons' embraces both cities and States."¹¹

Respondents would distinguish *City of Lafayette* from the case before because it involved the Sherman Act rather than the Robinson-Patman Act.¹² Such a distinction ignores the specific reference to the Robinson-Patman Act in our discus-

son" under § 7 of the Sherman Act); *Chattanooga Foundry & Pipe Works v. City of Atlanta*, 203 U. S. 390, 396 (1906) (municipality is a "person" within the meaning of § 8 of the Sherman Act). See also *Pfizer, Inc. v. Government of India*, 434 U. S. 308, 318 (1978) (foreign nation is a "person" under § 4 of the Clayton Act).

The Court has not considered it at all "anomalous to require compliance by municipalities with the substantive standards of other federal laws which impose . . . sanctions upon 'persons.'" *City of Lafayette v. Louisiana Power & Light Co.*, 435 U. S. 389, 400 (1978). See *California v. United States*, 320 U. S. 577, 585-586 (1944); *Ohio v. Helvering*, 292 U. S. 360, 370 (1934). One case is of particular relevance. In *Union Pacific R. Co. v. United States*, 313 U. S. 450 (1941), the Court considered the applicability to a city of § 1 of the Elkins Act, ch. 708, 32 Stat. 847, as amended, 34 Stat. 587, 49 U. S. C. § 41(1) (1976 ed.) (repealed 1978), "a statute which essentially is an antitrust provision serving the same purposes as the anti-price-discrimination provisions of the Robinson-Patman Act." *City of Lafayette*, 435 U. S., at 402 n. 19. The *Union Pacific* Court expressly found that a municipality was a "person" within the meaning of the statute. 313 U. S., at 462-463. See also *City of Lafayette*, 435 U. S., at 401 n. 19.

¹¹The word "purchasers" has a meaning as inclusive as the word "person." See 80 Cong. Rec. 6430 (1936) (remarks of Sen. Robinson) ("The Clayton Antitrust Act contains terms general to all purchasers. The pending bill does not segregate any particular class of purchasers, or exempt any special class of purchasers.").

¹²The only apparent difference between the scope of the relevant laws is the extent to which the activities complained of must affect interstate commerce. Congress's decision in the Robinson-Patman Act not to cover all transactions within its reach under the Commerce Clause, see *Gulf Oil Corp. v. Copp Paving Co.*, 419 U. S. 186, 199-201 (1974), does not mean that Congress chose not to cover the same range of "persons" whose conduct "in commerce" is otherwise subject to the Act.

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sion of the all-inclusive nature of the term "person." 435 U. S., at 397, n. 14. We do not perceive any reason to construe the word "person" in that Act any differently than we have in the Clayton Act, which it amends,¹³ and it is undisputed that the Clayton Act applies to states. See *Hawaii v. Standard Oil Co.*, 405 U. S. 251, 260-261 (1972).¹⁴ In sum, the plain language of the Act strongly suggests that there is no exemption for state purchases to compete with private

¹³ Indeed, the House and Senate Committee reports specifically state that "[t]he special definitions of section 1 of the Clayton Act will apply without repetition to the terms concerned where they appear in this bill, since it is designed to become by amendment a part of that act." H. R. Rep. No. 2287, Pt. 1, 74th Cong., 2d Sess. 7 (1936); S. Rep. No. 1502, 74th Cong., 2d Sess. 3 (1936). See 80 Cong. Rec. 3116 (1936) (remarks of Sen. Logan) ("[M]any have complained because the provisions of the bill apply to 'any person engaged in commerce.' . . . The original Clayton Act contains that exact language, and it is carried into the bill under consideration. The language of the Clayton Act was used because it has been construed by the courts."). Given their common purposes, it should not be surprising that the common terms of the Clayton and Robinson-Patman Acts should be construed consistently with each other. See *id.*, at 8137 (remarks of Rep. Michener) ("The Patman-Robinson bill does not suggest a new policy or a new theory. The Clayton Act was enacted in 1914, and it was the purpose of that act to do just what this law sets out to do."); *id.*, at 3119 (remarks of Sen. Logan) (purpose of Robinson-Patman bill is to strengthen Clayton Act); *id.*, at 6151 (address by Sen. Logan) (same).

¹⁴ JUSTICE O'CONNOR, in her dissenting opinion, questions our use of antitrust cases to define a word common to the antitrust laws. She would distinguish all of these cases uniformly holding States to be included in the word "persons," because none has held "that States or local governments are persons for purposes of exposure to liability as purchasers under the provisions of the Clayton Act." *Post*, at 4 (emphasis in original). The dissent takes no notice, however, of our decision last term in *Community Communications Co. v. City of Boulder*, 455 U. S. 40, 56 (1982), in which the Court stated that the antitrust laws, "like other federal laws imposing civil or criminal sanctions upon 'persons,' of course apply to municipalities as well as to other corporate entities." No authority is cited for the dissent's distinction between "persons" entitled to sue under the antitrust laws and "persons" subject to suit under those laws.

enterprise.

IV

The plain language of the Act is controlling unless a different legislative intent is apparent from the purpose and history of the Act. An examination of the legislative purpose and history here reveals no such contrary intention.

A

Our cases have been explicit in stating the purposes of the antitrust laws, including the Robinson-Patman Act. On numerous occasions, this Court has affirmed the comprehensive coverage of the antitrust laws and has recognized that these laws represent "a carefully studied attempt to bring within [them] every person engaged in business whose activities might restrain or monopolize commercial intercourse among the states." *United States v. South-Eastern Underwriters Association*, 322 U. S. 533, 553 (1944).¹⁵ In *Goldfarb v. Virginia State Bar*, 421 U. S. 773 (1975), the Court observed that "our cases have repeatedly established that there is a heavy presumption against implicit exemptions" from the antitrust laws. *Id.*, at 787 (citing *United States v. Philadelphia National Bank*, 374 U. S. 321, 350-351 (1963); *California v. FPC*, 369 U. S. 482, 485 (1962)).¹⁶ In *City of Lafayette*, *supra*, applying antitrust laws to a city in compe-

¹⁵ See, e. g., *Pfizer, Inc. v. Government of India*, 434 U. S. 308, 312-313 (1978) (noting "broad scope of the remedies provided by the antitrust laws") (applying Sherman Act cases to construe Clayton Act); *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U. S. 219, 236 (1948) ("[Sherman] Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by *whomever* they may be perpetrated.") (emphasis added).

¹⁶ See, e. g., *National Gerimedical Hospital & Gerontology Center v. Blue Cross*, 452 U. S. 378, 388 (1981); *City of Lafayette*, 435 U. S., at 398, 399; *Abbott Laboratories v. Portland Retail Druggists Assn., Inc.*, 425 U. S. 1, 11-12 (1976); *United States v. National Assn. of Securities Dealers, Inc.*, 422 U. S. 694, 719-720 (1975).

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tition with a private utility, we held that no exemption for local governments would be implied. The Court emphasized the purposes and scope of the antitrust laws: "[T]he economic choices made by public corporations . . . , designed as they are to assure maximum benefits for the community constituency, are not inherently more likely to comport with the broader interests of national economic well-being than are those of private corporations acting in furtherance of the interests of the organization and its shareholders." 435 U. S., at 403. See also *id.*, at 408.¹⁷

These principles, and the purposes they further, have been helpful in interpreting the language of the Robinson-Patman Act. As JUSTICE BLACKMUN stated for the Court in *Abbott Laboratories v. Portland Retail Druggists Assn., Inc.*, 425 U. S. 1, 11-12 (1976):

"It has been said, of course, that the antitrust laws, and Robinson-Patman in particular, are to be construed liberally, and that the exceptions from their application are to be construed strictly. *United States v. McKesson & Robbins*, 351 U. S. 305, 316 (1956); *FMC v. Seatrain*

¹⁷ In one important sense, retail competition from state agencies can be more invidious than that from chain-stores, the particular targets of the Robinson-Patman Act. Volume purchasing permits any large, relatively efficient, retail organization to pass on cost savings to consumers, and to that extent, consumers benefit merely from economy of scale. But to the extent that lower prices are attributable to lower overhead, resulting from federal grants, state subsidies, free public services, and freedom from taxation, state agencies merely redistribute the burden of costs from the actual consumers to the citizens at large. An exemption from the Robinson-Patman Act could give state agencies a significant *additional* advantage in certain commercial markets, perhaps enough to eliminate marginal or small private competitors. Consumers, as citizens, ultimately will pay for the full costs of the drugs sold by the state agencies involved in this case. Because there is no reason to assume that such agencies will provide retail distribution more efficiently than private retail pharmacists, consumers will suffer to the extent that state retail activities eliminate more efficient, private retail distribution systems.

Lines, Inc., 411 U. S. 726, 733 (1973); *Perkins v. Standard Oil Co.*, 395 U. S. 642, 646-647 (1969). The Court has recognized, also, that Robinson-Patman 'was enacted in 1936 to curb and prohibit all devices by which large buyers gained discriminatory preferences over smaller ones by virtue of their greater purchasing power.' *FTC v. Broch & Co.*, 363 U. S. 166, 168 (1960); *FTC v. Fred Meyer, Inc.*, 390 U. S. 341, 349 (1968). Because the Act is remedial, it is to be construed broadly to effectuate its purposes. See *Tcherepnin v. Knight*, 389 U. S. 332, 336 (1967); *Peyton v. Rowe*, 391 U. S. 54, 65 (1968)."

B

The legislative history falls far short of supporting respondents' contention that there is an exemption for state purchases of "commodities" for "resale." There is nothing whatever in the Senate or House Committee reports, or in the floor debates, focusing on the issue." Some members of Congress were aware of the possibility that the Act would apply to governmental purchases. Most members, however, were concerned not with state purchases, but with possible limitations on the Federal Government. The most relevant legislative history is the testimony of the Act's principal draftsman, H.B. Teegarden, before the House Judiciary Committee." Although the testimony is ambiguous on the

"JUSTICE O'CONNOR's dissenting opinion repeatedly emphasizes that Congress in 1936 did not focus specifically on the issue presented here. See post, at 6, 7, and nn. 10, 14, 15. This may well be true, as the likelihood of state entities competing in the private sector was remote in 1936. It cannot be contended, however, that Congress specifically intended to allow the competition at issue here. In any event, the absence of congressional focus is immaterial where the plain language applies. See, e. g., *United States v. South-Eastern Underwriters*, 322 U. S. 533, 556-558 (1944); *Browder v. United States*, 312 U. S. 335, 339 (1941); *De Lima v. Bidwell*, 182 U. S. 1, 197 (1901).

"[Rep.] Lloyd: Would this bill, in your judgment, prevent the granting

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application of the Act to state purchases for consumption, one conclusion is certain: Teegarden expressly stated that the Act would apply to the purchases of municipal hospitals in at least some circumstances.²⁰ Thus, his comments directly

of discounts to the United States Government?

Mr. Teegarden: Not unless the present Clayton Act does so. . . .

[Rep.] Lloyd: For instance, the Government gets huge discounts. . . . Now, would that discount be barred by this bill?

Mr. Teegarden: I do not see why it should, unless a discount contrary to the present bill would be barred—that is, the present law—would be barred by that bill.

Aside from that, my answer would be this: *The Federal Government is not in competition* with other buyers from these concerns. . . .

The Federal Government is saved by the same distinction They are not in competition with anyone else who would buy.

[Rep.] Hancock: It would eliminate competitive bidding all along the line, would it not, in classes of goods that would be covered by this bill?

Mr. Teegarden: You mean competitive bidding on Government orders?

[Rep.] Hancock: Government, State, city, municipality.

Mr. Teegarden: No; I think not.

[Rep.] Michener: If it did do it, you would not want it, would you?

Mr. Teegarden: No; I would not want it. It certainly does not eliminate competitive bidding anywhere else, and I do not see how it would with the Government.

[Rep.] Hancock: You would have to bid to the city, county, exactly the same as anybody else; same quantity, same price, same quality?

Mr. Teegarden: No.

[Rep.] Hancock: Would they or could they sell to a city hospital any cheaper than they would to a privately-owned hospital, under this bill?

Mr. Teegarden: I would have to answer it in this way. In the final analysis, it would depend upon numerous questions of fact in a particular case. *If the two hospitals are in competition with each other, I should say then that the fact that one is operated by the city does not save it from the bill.* If they are not in competition with each other, then they are in a different sphere.

The facts of the situation are not present upon which to predicate a discrimination in the nature of the case. I do not see that that question becomes any different under this bill from what it is under the present section 2 of the Clayton Act, for that bill also prohibits discrimination generally in

contradict the exemption found by the courts below for all such purchasing.²¹ In the absence of any other relevant evidence, we find no legislative intention to enable a State, by an unexpressed exemption, to enter private competitive markets with congressionally approved price advantages.²²

the same terms that this does. But it differs in the breadth of the exceptions. That is the only difference between the two bills.

Hearings on H. R. 4995 et al. before the House Committee on the Judiciary, 74th Cong., 1st Sess. 208-209 (1935) (emphasis added) [hereinafter 1935 Hearings].

*JUSTICE STEVENS agrees that state and local governments may be "purchasers" within the meaning of the Robinson-Patman Act. See *post*, at 1. He joins in JUSTICE O'CONNOR's dissent, however, on the basis of a novel theory: that state and local agencies may never be in "competition" with private parties within the meaning of the Act. See *ibid.* This is an economic fiction: If in fact a State participates in the private retail pharmaceutical market, it competes with the private participants. JUSTICE STEVENS relies on one statement by witness Teegarden in the 1935 House hearings, but attaches no significance to a further statement by the same witness: "In the final analysis, it would depend upon numerous questions of fact in a particular case. If the two hospitals are in competition with each other, I should say then that the fact that one is operated by the city does not save it from the bill." See 1935 Hearings, *supra* n. 19, at 209 (emphasis added).

*Teegarden subsequently submitted a written brief to the House committee. He first rejected outright the desirability of any exemptions. See 1935 Hearings, *supra* n. 19, at 249. He then posed the question whether "the bill [would] prevent competitive bidding on Governmental purchases below trade price levels." He stated that "[t]he answer is found in the principle of statutory construction that a statute will not be construed to limit or restrict in any way the rights, prerogatives or privileges of the sovereign unless it so expressly provides—a principle inherited by American jurisprudence from the common law . . ." But he also noted that "requiring a showing of effect upon competition . . . will further preclude any possibility of the bill affecting the Government." *Id.*, at 250.

All the cases Teegarden cited suggest that this sovereign-exception rule of statutory construction simply means that a government, when it passes a law, gives up only what it expressly surrenders. While the Robinson-Patman Act was pending before Congress, the Court stated that it could "perceive no reason for extending [the presumption against binding the

V

Despite the plain language of the Act and its legislative history, respondents nevertheless argue that subsequent legislative events and decisions of district courts confirm that

sovereign by its own statute] so as to exempt a business carried on by a state from the otherwise applicable provisions of an act of Congress, all-embracing in scope and national in its purpose, which is as capable of being obstructed by state as by individual action." *United States v. California*, 297 U. S. 175, 186 (1936). See *California v. Taylor*, 353 U. S. 553, 562-563 (1957). In the context of the Robinson-Patman Act, the rule of statutory construction on which Teegarden relied supports, at the most, an exemption for the Federal Government's purchases. The existence of such an exemption is not before us. Cf. *United States v. Cooper Corp.*, 312 U. S. 600, 604-605 (1941) (United States not a "person" under the Sherman Act for purposes of suing for treble damages). Moreover, Teegarden clearly assumed that governmental purchasing would not compete with private purchasing. That assumption, however, is inapplicable here.

"Six months after the Act was passed, the Attorney General of the United States responded to an inquiry from the Secretary of War regarding the Act's application "to government contracts for supplies." 38 Op. Atty. Gen. 539 (1936). In ruling that such contracts are outside the Act, the Attorney General explained:

[S]tatutes regulating rates, charges, etc., in matters affecting commerce do not ordinarily apply to the Government unless it is expressly so provided; and it does not seem to have been the policy of the Congress to make such statutes applicable to the Government. . . .

The [Robinson-Patman Act] merely amended the [Clayton Act] . . . and, in so far as I am aware, the latter Act has not been regarded heretofore as applicable to Government contracts.

Id., at 340. Later in the letter, the Attorney General clarified that his reference was to "the Federal Government," *ibid.*, and gave other reasons "for avoiding a construction that would make the statute applicable to the Government in violation of the apparent policy of the Congress in such matters," *id.*, at 341. The Attorney General expressly relied upon *Emergency Fleet Corp. v. Western Union Telegraph Co.*, 275 U. S. 415, 425 (1928), in which the Court upheld the granting of favorable telegraph rates to a federal corporation that competed with private enterprise.

The Attorney General's opinion says nothing about the Act's applicability to state agencies. Indeed, in the following year, the Attorney General of California expressly concluded that State purchases were within the

state purchases are outside the scope of the Act. We turn therefore to these subsequent events.

A

Respondents cite the hearings on the Robinson-Patman Act held in the late 1960s.²³ Testimony before the House Subcommittee investigating practices in the pharmaceutical

Act's proscriptions. See [1932-1939] Trade Cas. (CCH) ¶55,156, at 415-416 (1937). Two other early State attorney general opinions simply do not consider whether the Act applies to State purchases for *retail* sales. See Opinion of Attorney General of Minnesota, [1932-1939] Trade Cas. (CCH) ¶55,157, at 416 (1937); 26 Op. Att'y Gen. Wis. 142 (1937).

Representative Patman "presumed that the [United States] Attorney General's reasons may be also applied to municipal and public institutions." W. Patman, *The Robinson-Patman Act* 168 (1938). See also W. Patman, *Complete Guide to the Robinson-Patman Act* 30 (1963) (interpreting Attorney General's opinion as exempting all governmental purchases). His interpretation is entitled to some weight, but he appears only to be interpreting—or erroneously extending—the Attorney General's opinion and reasoning. Representative Patman's personal intentions probably are better reflected in his introduction in 1951 and 1953 of bills to amend the Act to define "purchaser" to include "the United States, any State or any political subdivision thereof." H. R. 4452, 82d Cong., 1st Sess. (1951); H. R. 3377, 83d Cong., 1st Sess. (1953). There is no legislative history on these bills, but it is arguable that he believed that the original intent needed to be stated expressly to negate his reading of the Attorney General's contrary construction of the Act. In any case, Congress's failure to pass these bills may be attributable to a reluctance to subject *federal* purchases to the Act. For example, in 1955, 1957, 1959, and 1961, Representative Keogh also unsuccessfully introduced bills to extend the Act to federal purchases only *for resale*. See H. R. 430, 87th Cong., 1st Sess. (1961); H. R. 155, 86th Cong., 1st Sess. (1959); H. R. 722, 85th Cong., 1st Sess. (1957); H. R. 5213, 84th Cong., 1st Sess. (1955).

It bears repeating, moreover, that none of these views—including Representative Patman's—focuses on the state purchases alleged here: purchases to gain competitive advantage in the private market rather than purchases for use in traditional governmental functions. For the Department of Justice's most recent statements regarding an exemption or immunity for state enterprises, see note 37, *infra*.

²³The most important relevant event in the Robinson-Patman Act's post-enactment history is the amendment in 1938 excluding eleemosynary

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industry indicated that the Act did not cover price discrimination in favor of state hospitals,²⁴ and Federal Trade Commission Chairman Paul Dixon disclaimed any authority over transactions involving state health care programs.²⁵ It is not at all clear, however, whether Chairman Dixon contemplated cases in which the state agency competed with private retailers, although he was aware of such practices by in-

institutions, 52 Stat. 446, 15 U. S. C. § 13c. Whether the existence of an exemption in § 13c supports an exemption for certain state purchases depends upon whether § 13c is interpreted to apply to state agencies that perform the functions listed. That is a substantial issue in its own right. Compare H. R. Rep. No. 1983, 90th Cong., 2d Sess. 7-8, 78 (1968) (suggesting that § 13c does not include government agencies), with 81 Cong. Rec. 8706 (1937) (remarks of Rep. Walter) (§ 13c would apply to institutions financed by cities, counties, and States). See also *City of Lafayette*, 435 U. S., at 397, n. 14 (§ 13c includes "public libraries," which "are, by definition, operated by local government"); *Abbott Laboratories*, 425 U. S., at 18 n. 10; 81 Cong. Rec. 8705 (1937) (remarks of Rep. Walter) (exemption codifies the intention of the drafters of the Robinson-Patman Act). We need not address this issue here.

²⁴ See, e. g., *Small Business and the Robinson-Patman Act: Hearings Before the Special Subcommittee on Small Business and the Robinson-Patman Act of the Select Committee on Small Business of the House of Representatives*, 91st Cong. 73-77 (1969-1970) (William McCamant, Director of Public Affairs, National Association of Wholesalers); *id.*, at 623 (Harold Halfpenny, counsel for the Automotive Service Industry Association); *Small Business Problems in the Drug Industry: Hearings Before the Subcommittee on Activities of Regulatory Agencies of the Select Committee on Small Business of the House of Representatives*, 90th Cong. 15-16 (1967-1968) [hereinafter *1967-1968 Hearings*] (Earl Kintner, former FTC Commissioner, counsel for the Nat'l Assn. of Retail Druggists) (State purchases "probably" exempt). But see *id.*, at 80 (remarks of Charles Fort, President, Food Town Ethical Pharmacies, Inc.) ("Robinson-Patman Act may prohibit this practice"); *id.*, at 86 (same). There also was testimony that institutional purchasers frequently obtain drugs at lower prices than do retail pharmacies, see *id.*, at 14, 258, 318, 1093-1094, and many witnesses complained that this discrimination adversely affected competition, see *id.*, at A-140 to A-141, 253-262, 273, 292.

²⁵ See H. R. Rep. No. 1983, *supra*, n. 23, at 74.

stitutional purchasers.²⁶ Other statements expressed little more than informed, interested opinions on the issue presented, and are not entitled to the consideration appropriate for the constructions given contemporaneously with the Act's passage.²⁷ See *supra*, at 9-11, and n. 22.

It is clear from the House Subcommittee's conclusions that it did not focus on the question presented by this case. The Subcommittee found that the difference between drug prices for retailers and government customers "is extremely substantial" and "not always fully explainable by either cost justifiable quantity discounts, economies of scale, or other factors inherent in bulk distribution." H. R. Rep. No. 1983, 90th Cong., 2d Sess. 77 (1968). In the next conclusion, it stated that "[n]umerous acts and policies of individual manufacturers seem . . . violative of the Robinson-Patman Act" *Ibid.* Thus, it is quite possible that the Subcommit-

²⁶ After hearing his testimony, the Subcommittee posed further questions for Chairman Dixon about the eroding influence on the retail druggists' market presented by: (i) expanding federal, state, and private group health care programs; (ii) the Federal Government's ability to purchase from drug manufacturers at prices substantially below wholesale cost; and (iii) instances of hospitals, "both nonprofit and proprietary, selling to outpatients or even nonpatients." *Id.*, at 73. In his response to the Subcommittee, Chairman Dixon declined to discuss further the last category, which involved § 13c issues. *Id.*, at 74. His disclaimer of FTC authority envisioned state purchases for welfare programs, not for resale in competition with private enterprise. Thus, the issue presented here is most similar to the issue not discussed by Chairman Dixon.

²⁷ Assuming that this post-enactment commentary before the Subcommittee can be imputed to Congress—quite a leap given the failure of the Subcommittee report to rely on it for its conclusions—"the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." *United States v. Price*, 361 U. S. 304, 313 (1960). See, e. g., *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U. S. 102, 117-118, and n. 13 (1980); *Oscar Mayer & Co. v. Evans*, 441 U. S. 750, 758 (1979); *United Air Lines, Inc. v. McMann*, 434 U. S. 192, 200, n. 7 (1977) ("Legislative observations 10 years after passage of the Act are in no sense part of the legislative history.").

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tee considered some state purchasing at discriminatory prices—about which it had heard testimony—to be unlawful. The Subcommittee report did include the awkwardly worded statement: "There is no basis apparent . . . why the mandate of the Robinson-Patman Act should not be applied to discriminatory drug sales favoring nongovernmental institutional purchasers, profit or nonprofit, to the extent there is prescription drug competition at the retail level with disfavored retail druggists." *Id.*, at 79. This unexceptional opinion, however, simply says that *private* institutional purchases may not facilitate unfair retail competition through sales at discriminatory prices. The Subcommittee said nothing expressly about the unfair competition at issue in this case.²⁸

B

Respondents also argue that, without exception, courts considering the Act's coverage have concluded that it does not apply to government purchasers. They insist that no court has imposed liability upon a seller or buyer, under either § 2(a) or § 2(f), when the discriminatory price involved a sale to a State, city, or county. See Brief for Respondent University 31-32. There are serious infirmities in these broad assertions: (i) this Court has never held nor suggested that there is an exemption for State purchases;²⁹ (ii) the number of judicial decisions even *considering* the Act's application to purchases by state agencies is relatively small;³⁰ (iii)

²⁸ The Subcommittee also concluded that the 1938 Amendment was "designed to afford immunity to private nonprofit institutions . . . to the extent the sales are for the nonprofit institution's 'own use,'" H. R. Rep. No. 1983, *supra* n. 23, at 78, but that would indicate more the construction of § 13c than it would the intent of the 1936 Congress.

²⁹ Indeed, our opinions suggest precisely the opposite. See *City of Lafayette*, 435 U. S., at 397, n. 14; *Abbott Laboratories*, 425 U. S., at 18-19, n. 10; *California Motor Transport Co. v. Trucking Unlimited*, 404 U. S. 508, 513 (1972).

³⁰ The parties cite fewer than a dozen cases, many with unpublished

respondents cite no court of appeals decision that has expressly adopted their interpretation of § 2 before the decision below; (iv) some of the district court cases upon which respondents rely are simply inapposite;³¹ (v) it is not clear that *any* published District Court opinion has relied solely on a state purchase exemption to dismiss a Robinson-Patman Act claim alleging injury as a result of government competition in the private market;³² and (vi) there are several cases that

opinions, that involve the application of the Robinson-Patman Act to state purchases. See nn. 31-33, *infra*. Cf. *Blue Chip Stamps v. Manor Drug Stores*, 421 U. S. 723, 731 (1975) (affirming rule adopted by "virtually all lower federal courts facing the issue in the *hundreds* of reported cases presenting this question over the past quarter century") (emphasis added); *Gulf Oil Corp. v. Copp Paving Co.*, 419 U. S. 186, 200-201 (1974) (adopting consistent, "longstanding" construction of Robinson-Patman Act after "nearly four decades of litigation").

³¹ See *Pacific Engineering & Production Co. v. Kerr-McGee Corp.*, [1974-1] Trade Cas. (CCH) ¶ 75,054, at 96,742 (Utah 1974) (*dicta*) (involving Federal Government as ultimate purchaser) (relying on Attorney General's opinion as sole support), *aff'd* in part and *rev'd* in part, 551 F. 2d 790, 798-799 (CA10) (finding legitimate competition despite different prices), *cert. denied*, 434 U. S. 879 (1977); *Sachs v. Brown-Forman Distillers Corp.*, 134 F. Supp. 9, 16 (SDNY 1955) (Act inapplicable because there was no proof that sales affected plaintiff adversely), *aff'd* on opinion below, 234 F. 2d 959 (CA2) (*per curiam*), *cert. denied*, 352 U. S. 925 (1956); *General Shale Products Corp. v. Struck Const. Co.*, 37 F. Supp. 598, 602-603 (WD Ky. 1941) (finding no "sale" under the Act and alternatively holding the Act inapplicable because "[n]either the government nor a city in its purchase of property considered necessary for the purposes of carrying out its governmental functions is in competition with another buyer who may be engaged in buying and reselling that article") (emphasis supplied), *aff'd*, 132 F. 2d 425, 428 (CA6 1942) (expressly reserving issue whether Robinson-Patman Act applies to sales to state agency), *cert. denied*, 318 U. S. 780 (1943). The *Sachs* court also indicated, in *dicta*, that it was unclear whether the Robinson-Patman Act applied to state purchases. 37 F. Supp., at 16.

³² Cf. *Mountain View Pharmacy v. Abbott Laboratories*, No. C-77-0094 (Utah, Sept. 6, 1977) (unpublished opinion) (consent by plaintiffs to dismiss with prejudice Robinson-Patman Act claims based on sales to state agen-

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suggest that the Robinson-Patman Act is applicable to state purchases for resale purposes.³³ This judicial track record is in no sense comparable to the unbroken chain of judicial decisions upon which this Court previously has relied for ascertaining a construction of the antitrust laws that Congress over a long period of time has chosen to preserve. See cases cited, n. 27, *supra*.

Respondents also seek support in the interpretations of various commentators and executive officials. But the most authoritative of these sources indicate that the question presented is unsettled;³⁴ others are not necessarily inconsistent

cies), *aff'd* in part and *rev'd* in part, 630 F. 2d 1383 (CA10 1980) (complaint insufficient because it failed to identify products or purchasers subject to discriminatory treatment); *Portland Retail Druggists Association v. Abbott Laboratories*, No. 71-543 (Ore., Sept. 11, 1972) (unpublished, oral opinion), vacated and remanded, 510 F. 2d 486 (CA9 1974) (§ 13c applied), vacated and remanded, 425 U. S. 1 (1976). One District Court has suggested in an alternative holding that there is an exemption for state purchases for nonconsumption use. *Logan Lanes, Inc. v. Brunswick Corp.*, No. 4-66-5, slip op. at 4-5 (Idaho, May 26, 1966) (unpublished opinion), *aff'd*, 378 F. 2d 212, 215-216 (CA9) (purchases by Utah State University within scope of § 13c; expressly declined to address "so-called governmental exemption"), cert. denied, 389 U. S. 898 (1967). All of these cases predate our decision in *City of Lafayette*.

³³ See *Burge v. Bryant Public School District*, 520 F. Supp. 328, 330-332 (ED Ark. 1980), *aff'd*, 658 F. 2d 611 (CA8 1981) (*per curiam*); *Champaign-Urbana News Agency, Inc. v. J.L. Cummins News Co.*, 479 F. Supp. 281, 286-287 (CD Ill. 1979) (although Act inapplicable to federal purchases, state agencies might face an opposite result), *aff'd*, 632 F. 2d 680 (CA7 1980); *A.J. Goodman & Son v. United Lacquer Manufacturing Corp.*, 81 F. Supp. 890, 893 (Mass. 1949). Other cases cut against any exemption for state purchases. See *Municipality of Anchorage v. Hitachi Cable, Ltd.*, 547 F. Supp. 633, 637-641 (Alaska 1982); *Sterling Nelson & Sons v. Rangen, Inc.*, 235 F. Supp. 393, 399 (Idaho 1964), *aff'd*, 351 F. 2d 851, 858-859 (CA9 1965), cert. denied, 383 U. S. 936 (1966); *Sperry Rand Corp. v. Nassau Research & Development Associates*, 152 F. Supp. 91, 95 (EDNY 1957). Cf. *Reid v. University of Minnesota*, 107 F. Supp. 439, 443 (ND Ohio 1952) (expressly not addressing whether state agency exempt from Act when engaged in a business in the same manner as other business corporations).

³⁴ See 5A Z. Cavitch, *Business Organizations* § 105D.01[8][c] (1973 &

with our holding;³⁵ and in some cases they support it.³⁶ Thus, Congress cannot be said to have left untouched a universally held interpretation of the Act.³⁷

In sum, it is clear that post-enactment developments—whether legislative, judicial, or in commentary—rarely have considered the specific issue before us. There is simply no unambiguous evidence of congressional intent to exempt pur-

Supp. 1982) (opinions "divided" whether Act is applicable); 4 J. Kalinowski, *Antitrust Laws and Trade Regulation* § 24.06, at 24-70 (1982) ("there is some conflict among the authorities as to whether sales to states and municipalities are covered by the Act"); *id.* § 24.06[2]; E. Kintner, *A Robinson-Patman Primer* 203 (1970) ("Although [the Attorney General's] opinion appears to have settled the matter where the federal government is concerned, some controversy has arisen over the applicability of the act to purchases by state and local governments."); F. Rowe, *Price Discrimination Under the Robinson-Patman Act* § 4.12 (1962).

³⁵Some deal only with sales to the Federal Government. See Letter from Comptroller General to Robert F. Sarlo, Veterans Administration (July 17, 1973), reprinted in [1973-2] *Trade Cas. (CCH)* ¶ 74,642. Almost all fail to mention, much less decide, whether the Act applies to State purchases for retail sales. See Report of the Attorney General Under Executive Order 10936, *Identical Bidding in Public Procurement* 11 (1962).

³⁶See 62 Op. Cal. Atty. Gen. 741 (1979); 47 N.C.A.G. 112, 115 (1977); [1948-1949] Ga. Op. Atty. Gen. 723, 727 (if state agency competes with private enterprise, it is subject to Act).

³⁷In its 1977 Report of the Task Group on Antitrust Immunities, at 25, the Department of Justice stated:

"The mere fact that a state has authorized a state-owned enterprise to engage in commercial activity should not be sufficient to immunize all activities of the enterprise from the antitrust laws. That test removes the clearly sovereign activities of a state from the antitrust scrutiny of the federal government while holding the commercial activities of a state-owned enterprise to the same standards requir[ed] of all who engage in commercial transactions in the market."

Reprinted in *Antitrust Exemptions and Immunities: Hearings Before the Subcommittee on Monopolies and Commercial Law of the Committee on the Judiciary of the House of Representatives*, 95th Cong., 1st Sess., 1890 (1977). Cf. *Victory Transport Inc. v. Comisaria General de Abastecimientos y Transportes*, 336 F. 2d 354, 360-362 (CA2 1964) (the charter of a ship to haul grain by a state instrumentality not a sovereign activity that would justify applying the sovereign immunity doctrine).

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chases by a State for the purpose of competing in the private retail market with a price advantage.*

VI

The Robinson-Patman Act has been widely criticized, both for its effects and for the policies that it seeks to promote. Although Congress is well aware of these criticisms, the Act has remained in effect for almost half a century. And it certainly is "not for [this Court] to indulge in the business of policy-making in the field of antitrust legislation. . . . Our function ends with the endeavor to ascertain from the words used, construed in the light of the relevant material, what was in fact the intent of Congress." *United States v. Cooper Corp.* 312 U. S., 600, 606 (1941).

"A general application of the [Robinson-Patman] Act to all combinations of business and capital organized to suppress commercial competition is in harmony with the spirit and impulses of the times which gave it birth." *South-Eastern Underwriters*, 322 U. S., at 553. The legislative history is replete with references to the economic evil of large organizations purchasing from other large organizations for resale in competition with the small, local retailers. There is no reason, in the absence of an explicit exemption, to think that

*The dissent of JUSTICE O'CONNOR relies in large part, not on the words of the statute, or its legislative history, but on assertions that a "general consensus [existed] in the legal and business communities that sales to governmental entities are not covered by the Robinson-Patman Act." *Post*, at 9. See also *post*, at 4 (STEVENS, J., dissenting). JUSTICE O'CONNOR is correct that some in the business and legal community did think that an exemption existed for all state purchases. See *post*, at 12-14, nn. 19 and 20. But to say there is a "consensus" is to disregard the opinion of commentators, see n. 34, *supra*; the views expressed that the Act is applicable to state purchases, see *supra*, at 10, 12-13 n. 22, and 19, and n. 37; and the most recent, relevant opinion of the Department of Justice, see *supra*, at 19, and n. 37. It is more accurate to say that this was an unsettled question of federal law that demanded this Court's attention.

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congressmen who feared these evils intended to deny small businesses, such as the pharmacies of Jefferson County, Alabama, protection from the competition of the strongest competitor of them all.² To create an exemption here clearly would be contrary to the intent of Congress.

VII

We hold that the sale of pharmaceutical products to state and local government hospitals for resale in competition with private pharmacies is not exempt from the proscriptions of the Robinson-Patman Act. The judgment of the Court of Appeals accordingly is reversed and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

² Under our interpretation, the Act's benefits would accrue, precisely as intended, to the benefit of small, private retailers. See *1935 Hearings*, *supra*, n. 20, at 261 (Teegarden recommending passage "for the protection of private rights").

SUPREME COURT OF THE UNITED STATES

No. 81-827

JEFFERSON COUNTY PHARMACEUTICAL ASSOCIATION, INC., PETITIONER v. ABBOTT LABORATORIES ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[February 23, 1983]

JUSTICE STEVENS, dissenting.

While I join JUSTICE O'CONNOR's dissenting opinion, I believe an additional comment on the text of the Robinson-Patman Act may help to explain my vote. For purposes of interpreting that statute, I think that federal, state, and local agencies are "purchasers," but that such governmental agencies are not engaged in "competition" with private parties even when they resell purchased goods to consumers who might otherwise have patronized a private retailer. Both before and after the 1936 statute amended § 2 of the Clayton Act, the requirement of proving an adverse effect on "competition" played an important part in limiting the coverage of the statute.

It is universally agreed that federal purchases are not covered by the Act. Even though it has always been obvious that primary line competition might be injured by discriminatory prices on sales to the federal government, and also that goods sold to military post exchanges would normally be resold at a substantial discount, no one in the 1936 legislative deliberations questioned the inapplicability of the Act to these sales. The explanation, in my opinion, does not rest on the sovereign status of the federal government,* but rather

*When Mr. Teegarden responded to specific written questions about

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on the assumption embodied in the Act that federal agencies do not compete with nongovernmental entities.

Mr. Teegarden, the lobbyist, made this assumption clear in his statement at the 1935 House hearings, quoted in part by the opinion of the Court. *Ante*, at 9, n. 17:

"Mr. Lloyd: Would this bill, in your judgment, prevent the granting of discounts to the United States Government? . . . For instance, the Government gets huge discounts. Take that electric fan, for instance. You go to the ordinary store and the list price is \$25. The Procurement Division procures them delivered, one at a time, for \$13.18. Now, would that discount be barred by this bill?

Mr. Teegarden: I do not see why it should . . .

Aside from that, my answer would be this: The Federal Government is not in competition with other buyers from these concerns. Therefore a discrimination—it is so applied universally in interstate commerce law, in the railroad law—to have a discrimination, there must be a relative position between the parties to the discrimination which constitutes an injury to one as against the other. I think the answer is to be found in that.

In other words, if seller A makes a price to a retailer in New York and a different price to a retailer in San

the Act, he gave two reasons why the bill would not prevent competitive bidding on government purchases below trade price levels. First, he stated that a statute would not be construed to restrict the rights, prerogatives, or privileges of the sovereign unless it expressly so provided. This reason would apply only to the federal government, as the Court's opinion points out. *Ante*, at 10, n. 18-19. In addition, however, Mr. Teegarden gave a reason that applies to governmental entities at state and local levels as well. "The further insertion of the clause proposed under topic 4 below, requiring a showing of effect upon competition, will further preclude any possibility of the bill affecting the Government." *Hearings on H. R. 4995 et al. before the House Committee on the Judiciary, 74th Cong., 1st Sess. 250 (1935).*

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Francisco, all other things aside, no case of discrimination could be predicated there, because the two are not in the same sphere at all.

The Federal Government is saved by the same distinction, not of location but of function. They are not in competition with any one else who would buy." *Hearings on H. R. 4995 et al. before the House Committee on the Judiciary*, 74th Cong., 1st Sess. 208-209 (1935).

I would interpret the "distinction, not of location but of function" somewhat more broadly than does the majority. It is not merely a question of whether government agencies do or do not resell the goods they have purchased. Even when they resell items to the public, governmental entities do not engage in competition with private retailers in the same sense that chain stores compete with independent retailers. Most importantly, their activities are seldom affected by a profit-making motivation; rather they are undertaken in connection with the provision of services to the public. Further, their merchandising and price-setting decisions take a different set of factors into account. As the Court notes, *ante*, at 7-8 n. 16, they need not include a profit component, their overhead may be subsidized, and they may be exempt from state or federal taxation. In short, governmental agencies are in an entirely different category of market participants.

I am convinced that the same analysis applies to purchases and resales by state and local agencies. I do not believe that a municipal hospital that operates a pharmacy is any more engaged in competition with a retail druggist than a military post exchange is engaged in competition with a retail grocer or a retail clothing store. To be sure, this analysis is not entirely consistent with the conclusion implied by Mr. Teegarden's somewhat equivocal answer to Congressman Hancock. Although he did not say that purchases by a city hospital would be covered by the bill, he did state that, "*If the*

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two hospitals are in competition with each other," the fact that one was operated by the city would not save it from the bill. But he went on to stress, "*If they are not in competition with each other, then they are in a different sphere.*" *Id.*, at 209. In my view, if not in Mr. Teegarden's, the differences between a city hospital and a private hospital justify the conclusion that, for purposes of construing this statute, they should not be considered in competition with each other. I therefore would hold as a matter of law that neither purchases nor sales by governmental agencies—federal, state, or local—constitute "competition" with private persons to which the statute has any application. The Act has no impact on any governmental agency's ability to provide hospital and related services to its constituents. For the reasons JUSTICE O'CONNOR has set forth in greater detail, I believe such a holding more accurately reflects the understanding of the Congress that enacted the statute and the lawyers and businessmen who have lived with the statute on a day-to-day basis for almost half a century.

SUPREME COURT OF THE UNITED STATES

No. 81-827

JEFFERSON COUNTY PHARMACEUTICAL ASSOCIATION, INC., PETITIONER *v.* ABBOTT LABORATORIES ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[February 23, 1983]

JUSTICE O'CONNOR, with whom JUSTICE BRENNAN, JUSTICE REHNQUIST, and JUSTICE STEVENS join, dissenting.

The issue that confronts the Court is one of statutory construction: whether the Robinson-Patman Act covers purchases of commodities by state and local governments for resale in competition with private retailers.¹ The Court's task, therefore, is to discern the intent of the 1936 Congress which enacted the Robinson-Patman Act. I do not agree with the majority that this issue can be resolved by reference to cases under the Sherman Act or other statutes, or by reliance on the broad remedial purposes of the antitrust laws generally. The 1936 Congress simply did not focus on this issue. The business and legal communities have assumed for the past four decades that such purchases are not covered. For these reasons, as explained more fully below, I respectfully dissent.

¹ This case does not require us to consider, as the cases cited by the majority suggest, *ante*, at 7, whether compliance with other federal statutes necessitates an implied exemption from the provisions of the Act. The question is simply one of congressional intent—i. e., what Congress intended when it enacted the Robinson-Patman Act with respect to coverage of governmental purchases for resale.

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I

A

The majority relies extensively on the interpretation this Court has given to the term "person" under the Sherman Act and other statutes as a guide to whether the terms "person" and "purchasers," as used in § 2 of the Clayton Act, 38 Stat. 730, as amended by the Robinson-Patman Act (the Act), 49 Stat. 1526, 15 U. S. C. § 13, include state and local governmental entities. See *ante*, at 4-6. In my view, such reliance is misplaced. The question of the Robinson-Patman Act's treatment of governmental purchases requires an independent examination of the legislative history of *that* Act to ascertain congressional intent.² Indeed, the cases cited by the majority emphasize that the key question regarding coverage or noncoverage of governmental entities is the intent of Congress *in enacting the statute in question*.³ Resolution of

²The majority cites *Pfizer, Inc. v. Government of India*, 434 U. S. 308 (1978), as a case in which the Court applied Sherman Act cases to construe the Clayton Act, which the Robinson-Patman Act amends. *Ante*, at 7, n. 14. In *Pfizer* the Court held that a foreign nation is a "person" entitled to bring a treble damages action under § 4 of the Clayton Act, 15 U. S. C. § 15. As the Court acknowledged, *id.*, at 311, § 4 is a reenactment of the virtually identical language of § 7 of the Sherman Act. In fact, § 7 was eventually repealed as redundant. § 3, 69 Stat. 283; see S. Rep. No. 619, 84th Cong., 1st Sess., 2 (1955). Reliance on prior interpretation of § 7 of the Sherman Act was therefore uniquely appropriate.

³See *Pfizer, Inc. v. Government of India*, *supra*, at 315 (1978) (§ 4 of the Clayton Act) ("The word 'person' . . . is not a term of art with a fixed meaning wherever it is used, nor was it in 1890 when the Sherman Act was passed."); *Georgia v. Evans*, 316 U. S. 159, 161 (1942) (§ 7 of the Sherman Act) ("Whether the word 'person' . . . includes a State or the United States depends upon its legislative environment."); *Ohio v. Helvering*, 292 U. S. 360, 370 (1934) (Rev. Stat. §§ 3140, 3244) ("Whether the word 'person' or 'corporation' includes a state . . . depends upon the connection in which it is found."). See also *United States v. Cooper Corp.*, 312 U. S. 600, 604-605 (1941) ("[T]here is no hard and fast rule of exclusion. The purpose, the subject matter, the context, the legislative history, and the executive in-

the statutory construction question cannot be made to depend upon the abstract assertion that the term "person" is broad enough to embrace States and municipalities.⁴ For these reasons, the mere fact that in *City of Lafayette v. Louisiana Power & Light Co.*, 435 U. S. 389, 397 n. 14 (1978), a Sherman Act case, the Court referred to the Robinson-Patman Act in its discussion of the breadth of the term "person" cannot resolve the question now before us.

Further, the majority opinion propounds a misleading syllogism when it (1) suggests that the term "person" in the Clayton and Robinson-Patman Acts should be construed similarly, (2) cites *Hawaii v. Standard Oil Co.*, 405 U. S. 251 (1972), for the proposition that the Clayton Act applies to States, and (3) then opines that the terms "person" and "purchasers" under § 2 therefore should be construed to include

terpretation of the statute are aids to construction which may indicate intent, by the use of the term, to bring state or nation within the scope of the law.").

It is also worth noting that many of the cases upon which the majority relies involved construction of the term "person" for the purpose of determining whether a particular governmental entity is a "person" entitled to sue. *Pfizer, Inc. v. Government of India*, *supra*; *United States v. Cooper Corp.*, *supra* (United States is not "person" entitled to sue under § 7 of the Sherman Act); *Georgia v. Evans*, *supra* (State is "person" entitled to sue under § 7 of the Sherman Act); *Chattanooga Foundry & Pipe Works v. City of Atlanta*, 203 U. S. 390 (1906) (municipality is "person" entitled to sue under § 7 of the Sherman Act).

'I would also note that the majority overstates the significance of Senator Robinson's remarks in connection with its observation that "[t]he word 'purchasers' has a meaning as inclusive as the word 'person.'" *Ante*, at 5, n. 11. The remarks of Senator Robinson should not be read to suggest that the word "purchasers," as used in the Robinson-Patman Act, embraces States or municipalities. The senator's observation reflects an affirmative response to Senator Vandenberg's concern that, although the bill was drafted with a view toward the problems of large chain-store buying power in the retail merchandising field, the Act would apply to *private* enterprise in the field of industrial production as well. See 80 Cong. Rec. 6429-6430 (1936).

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state purchases. *Ante*, at 6. Because, as the majority observes, *ante*, at 6, n. 13, the definitional section of the Clayton Act, 15 U. S. C. § 12, was intended to apply to the Robinson-Patman Act, I do not dispute the first proposition. However, *Hawaii v. Standard Oil Co.* stated only that a State is a "person" for purposes of bringing a treble damages action under § 4 of the Clayton Act. 405 U. S., at 261.⁵ Conspicuously absent from the majority's discussion is any authority holding that States or local governments are persons for purposes of exposure to liability as purchasers under the provisions of the Clayton Act.⁶ Although Congress might now decide that the purchasing activities of States and

⁵ Were Congress to consider the specific question of liability of governmental entities as purchasers under the Robinson-Patman Act, it seems reasonable to assume that it would approach that question with a different set of policy concerns than those bearing on the decision whether to extend the benefit of the Act's protections to those entities. Cf. *Parker v. Brown*, 317 U. S. 341, 351 (1943) ("In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress.").

⁶ Indeed, one basis for the United States Attorney General's conclusion in 1938 that the Robinson-Patman Act is inapplicable to purchases of supplies by the Federal Government was the absence of any judicial decision construing the Clayton Act, prior to its amendment by the Robinson-Patman Act, to apply to governmental contracts. 38 Op. Atty. Gen. 539, 540 (1938).

Prior to 1929, courts interpreted the original § 2 as addressed only to the problem of primary line competition—i. e., injury to competition among sellers. See, e. g., *National Biscuit Co. v. FTC*, 299 F. 733 (CA2), cert. denied, 266 U. S. 613 (1924). Not until 1929 did this Court hold that § 2 also protected against the type of injury alleged in the present case—i. e., secondary line injury, or injury to competition among buyers. See *George Van Camp & Sons Co. v. American Can Co.*, 278 U. S. 245, 253 (1929). The Robinson-Patman amendment to § 2 clarified that the Act was designed to redress the latter type of injury.

local governments *should* be subject to the limitations imposed by §2, that is a policy judgment appropriately left to legislative determination.

B

Nor do I find persuasive the majority's invocation of presumptions regarding the liberal construction and broad remedial purposes of the antitrust laws generally. Without derogating the usefulness of those principles or suggesting that they should never play a role in the Robinson-Patman context, one may nevertheless candidly acknowledge that the Court also has identified a certain tension between the Robinson-Patman Act, on the one hand, and the Sherman Act and other antitrust statutes, on the other. The Court frequently has recognized that strict enforcement of the anti-price-discrimination provisions of the former may lead to price rigidity and uniformity in direct conflict with the goals of the latter. See, e. g., *Great Atlantic & Pacific Tea Co. v. FTC*, 440 U. S. 69, 80, 83 n. 16 (1979); *Automatic Canteen Co. v. FTC*, 346 U. S. 61, 63, 74 (1953); *Standard Oil Co. v. FTC*, 340 U. S. 231, 249 & n. 15 (1951).⁷

At the very least, this recognition raises doubts that the Court should liberally construe the Robinson-Patman Act in favor of broader coverage. Those doubts are enhanced by the fact that Congress' principal aim in enacting the Robinson-Patman Act was to protect small retailers from the competitive injury suffered at the hands of large chain stores.⁸

⁷ Indeed, the tension between the Robinson-Patman policy of protection of competitors and the Sherman Act goal of protection of the competitive process has prompted the Court to achieve a partial reconciliation of the two by liberal interpretation of the "meeting competition" defense under §2(b) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U. S. C. §13(b). See *Standard Oil Co. v. FTC*, 340 U. S. 231, 251 (1951).

⁸ H. R. Rep. No. 2287, 74th Cong., 2d Sess., 3-4 (1936); S. Rep. No. 1502, 74th Cong., 2d Sess., 4 (1936); see FTC, Final Report on the Chain Store Investigation, S. Doc. No. 4, 74th Cong., 1st Sess. (1935).

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It is consistent with that intent for Congress also to have displayed special solicitude for the well-established, below-trade price buying practices of governmental institutions.

II

As the majority documents, *ante*, at 9, n. 17, the legislative history of the Robinson-Patman Act clearly indicates that Congress envisioned *some* sort of immunity for governmental bodies.⁹ The question before the Court is the extent of that immunity—in particular, whether the purchase of goods by state and local governments for resale in competition with private retailers is within the intended scope of the Robin-

⁹ Members of the House expressed concern with the effect of the bill on the established below-market buying practices of federal, state, county, and municipal governments. *Hearings on H. R. 4995 et al. Before the House Committee on the Judiciary*, 74th Cong., 1st Sess., 209 (1935). In response H. B. Teegarden, a principal draftsman of the Act, assured members of the House Judiciary Committee that he "would not want" the Act if it prohibited, all along the line, the competitive bidding practices of those governments. *Ibid.*

Moreover, with respect to subsequent legislative history, I find significant the fact that later attempts in Congress to expressly include governmental entities within the coverage of the Act failed. See H. R. 4452, 82d Cong., 1st Sess. (1951); H. R. 3377, 83d Cong., 1st Sess. (1952); H. R. 5213, 84th Cong., 1st Sess. (1955); H. R. 722, 85th Cong., 1st Sess. (1957); H. R. 155, 86th Cong., 1st Sess. (1959); H. R. 430, 87th Cong., 1st Sess. (1961). In particular, I would not dismiss as readily as does the majority, *ante*, at 11, n. 19, the bills introduced by Representative Patman in 1951 and 1953 to amend the Act to define "purchasers" to include "the United States, any State or any political subdivision thereof." The majority speculates that Representative Patman introduced these bills to reaffirm his original intent that these entities would be covered. In light of Representative Patman's agreement in his book, W. Patman, *The Robinson-Patman Act* 168 (1938), with the United States Attorney General's construction of the Act to exclude purchases by the Federal Government and his extension of the Attorney General's rationale to "municipal and public institutions," *id.*, it is more plausible to infer that he viewed the bills as *extending* the Act's coverage.

son-Patman Act. As the majority acknowledges, *ante*, at 9, the 1936 Congress that enacted the Robinson-Patman Act did not focus on the precise issue before the Court. Notwithstanding this admission, the majority announces the surprising conclusion that "[t]o create an exemption here *clearly* would be contrary to the intent of Congress." *Ante*, at 19 (emphasis added).

The majority is correct in stating that it is not the business of this Court to engage in "policy-making in the field of anti-trust legislation" in order to fill gaps where Congress has not clearly expressed its intent. *Ante*, at 19 (quoting *United States v. Cooper Corp.*, 312 U. S. 600, 606 (1941)). It is precisely because I concur in that admonition that I would refrain from attributing to Congress an intent to cover the state and local governmental purchases in question here.¹⁰

A

In attempting to supply the unexpressed intent of Congress, the majority fails to offer satisfactory guidelines for

¹⁰ My resolution of the statutory issue here should not be construed to reflect a policy judgment that the Robinson-Patman Act *should* protect "a State's entrepreneurial capacity." *City of Lafayette v. Louisiana Power & Light Co.*, 435 U. S. 389, 422 (BURGER, C. J., concurring). We are not concerned here with whether the kind of activity in which these governmental entities are engaged *appropriately* exposes them to antitrust liability under the Act. Cf. *id.*, at 418. That question raises policy concerns lying peculiarly within the institutional province of Congress. "A court, without the benefit of legislative hearings that would illuminate the policy considerations if the question were left to Congress, is not competent in my opinion to resolve this question It is regrettable that the Court today finds it necessary to rush to this essentially legislative judgment." *Pfizer, Inc. v. Government of India*, 434 U. S., at 331 (POWELL, J., dissenting). Because the question before us is one of congressional intent and it is far from clear that Congress has supplied an answer to that question, I would refrain from substituting the policy judgments of the judiciary for those Congress might embrace. Cf. *id.*, at 320 (BURGER, C. J., dissenting); *id.*, at 330-331 (POWELL, J., dissenting).

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determining the scope of the Act's coverage of governmental agencies." The majority assumes, "without deciding, that Congress did not intend the Act to apply to purchases for consumption in traditional government functions" and suggests that state purchases of pharmaceuticals for the purpose of resale to indigent citizens may not expose the State to anti-trust liability. *Ante*, at 4, and n. 7.

The majority's assumption, however, is inconsistent with the principles of statutory construction upon which it purports to rely. If, absent a clear expression of legislative intent to the contrary, the plain language of the statute controls, then by the majority's own assertions one would have to conclude that even purchases for the State's own use or for resale to indigents would fall within the Act's proscriptions. For, as the majority remarks, *ante*, at 4, the terms "person" and "purchasers" are broad enough to include governmental entities, and the legislative history is "ambiguous on the application of the Act to state purchases for consumption" *Ante*, at 9-10.

Moreover, to the extent the majority implies that a State's coverage or noncoverage under the Act turns on the distinction between purchases for resale and purchases for consumption,¹² that distinction is inconsistent with the compe-

¹² To the extent the majority purports to "divine" the will of Congress, it comes as no surprise, given Congress' inattention to this precise question, that no "bright lines" for coverage and noncoverage emerge from its opinion.

¹³ The majority thus suggests, though it refrains from holding, that the scope of coverage under § 2(a) is coextensive with the "for their own use" line drawn by the Nonprofit Institutions Act of 1938, 15 U. S. C. § 13c, and interpreted by the Court in *Abbott Laboratories v. Portland Retail Drug-gists Association, Inc.*, 425 U. S. 1 (1976). This proposed resale/consumption distinction has no foundation in the language of § 2(a), which prohibits discrimination "in price between different purchasers of commodities . . . , where such commodities are sold for use, consumption, or re-

tition rationale elsewhere suggested, *ante*, at 19, to underlie the prohibitions of §2(a). For example, a state university hospital might limit the use of its pharmacy to its own faculty and staff, thereby falling within the "for their own use" exception.¹⁵ Nevertheless, the university pharmacy may be inflicting competitive injury on private pharmacies that the university's faculty and staff might otherwise patronize.¹⁶ Thus, the majority's conflicting suggestions leave in doubt what principle—the presence of functional competition or the consumption/resale dichotomy—guides the determination whether a state or local government's purchases fall within the Act's proscriptions.

B

Against the backdrop of a legislative history that even the majority concedes does not focus on the issue before us stands the general consensus in the legal and business communities that sales to governmental entities are not covered by the Robinson-Patman Act. The majority devotes considerable effort to distinguishing or undercutting the authorities cited by the respondents. In so doing, and in observing that these authorities cannot reveal Congress' intent in 1936, *ante*, at 14, and n. 24, the majority misunderstands the significance of this evidence. These authorities simply illustrate the virtually unanimous assumption over the past 47 years of noncoverage of governmental entities—an assumption that has served as the basis of well-established governmental purchasing practices and marketing relationships.

sale" 15 U. S. C. § 13(a) (emphasis added).

¹⁵ See *Abbott Laboratories v. Portland Retail Druggists Association, Inc.*, *supra*, at 16-17.

¹⁶ Or, to take another example, a cafeteria operated by a governmental agency for the benefit of its employees also might inflict some competitive injury on restaurants in the same area that otherwise might enjoy the employees' patronage.

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In the past the Court has relied upon the widespread understanding of the provisions of the Robinson-Patman Act in limiting the scope of the Act's prohibitions.¹⁵ To do so here is no less appropriate.

Despite its attempt to discount the significance of the judicial authorities cited by the respondents, the majority cannot dispute that no court has imposed liability upon a seller or buyer, under either § 2(a) or § 2(f), 15 U. S. C. §§ 13(a) and (f), in a case involving an alleged price discrimination in favor of a federal, state, or municipal governmental purchaser.¹⁶

¹⁵ See *Standard Oil Co. v. FTC*, 340 U. S. 231, 246-247 (1951) (reliance on widespread understanding that the meeting competition proviso of § 2(b) of the Clayton Act, as amended by the Robinson-Patman Act, provides a complete defense to a charge of price discrimination).

¹⁶ See *Champaign-Urbana News Agency, Inc. v. J.L. Cummins News Co.*, 632 F. 2d 680, 688-689 (CA7 1980) (Robinson-Patman Act inapplicable to purchases by instrumentality of Federal Government for resale); *Mountain View Pharmacy v. Abbott Laboratories Pharmaceutical Products Division*, No. C-77-0094 (Utah, Aug. 15, 1977) (unpublished opinion) (order of consent dismissing with prejudice Robinson-Patman claims based on sales to any governmental entity), *aff'd* in part and *rev'd* in part on other grounds, 630 F. 2d 1383 (CA10 1980); *Logan Lanes, Inc. v. Brunswick Corp.*, No. 4-66-5 (Idaho, May 26, 1966) (unpublished opinion) (sale of bowling equipment to State not within provisions of Act; alternative holding that sales exempt under 15 U. S. C. § 13c), *aff'd*, 378 F. 2d 212, 217 (CA9) (sales to state university within § 13c exemption), *cert. denied*, 389 U. S. 898 (1967); *Sperry Rand Corp. v. Nassau Research & Development Associates*, 152 F. Supp. 91, 96 (EDNY 1957) (disclaiming, on motion for reargument, any intention that original opinion could be "construed to suggest that sales to the Government can be thought to be subject to the provisions of the Robinson-Patman Act"); *Sachs v. Brown-Forman Distillers Corp.*, 134 F. Supp. 9, 16 (SDNY 1955) ("It is doubtful at best whether the Robinson-Patman Act applies at all to sales to Government agencies, state or federal.") (holding Act inapplicable to sales by liquor distiller to state liquor commissions; alternative holding that no competitive injury suffered by plaintiff liquor wholesaler), *aff'd* on opinion below, 234 F. 2d 959 (CA2), *cert. denied*, 352 U. S. 925 (1956); *General Shale Products Corp. v. Struck Corp.*, 37 F. Supp. 598, 602-603 (WD Ky. 1941) (alternatively holding that Robinson-Patman Act inapplicable to sales to municipal housing commis-

Commentators confirm the general judicial consensus that sales to States and municipalities are not covered by the Act.¹⁷ Moreover, Congress' failure to enact bills extending Robinson-Patman coverage to these entities buttresses this interpretation of the Act. See n. 9, *supra*.

sion and suggesting that "the Act does not apply to sales to the government, states, or municipalities"), *aff'd*, 132 F. 2d 425 (CA6 1942), cert. denied, 318 U. S. 780 (1943).

While one may concede that most of these cases do not focus on the precise situation of purchases by state or local governments for resale, they nonetheless reflect the consensus of judicial opinion that governmental bodies are not subject to liability under § 2 of the Clayton Act, as amended by the Robinson-Patman Act. The majority would dismiss many of these cases with the simple observation that they predate the Court's decision in *City of Lafayette v. Louisiana Power & Light Co.*, 435 U. S. 389 (1978). *Ante*, at 16, n. 29. For reasons already noted, however, in my view *City of Lafayette* does not resolve the issue before us in this case.

Moreover, cases that the majority suggests are supportive of its position, *ante*, at 17, n. 30, are similarly distinguishable. For example, both *Municipality of Anchorage v. Hitachi Cable, Ltd.*, 547 F. Supp. 633 (Alaska 1982), and *Sterling Nelson & Sons, Inc. v. Rangen, Inc.*, 235 F. Supp. 393 (Idaho 1964), *aff'd*, 351 F. 2d 851, 858-859 (CA9 1965), cert. denied, 383 U. S. 936 (1966), indicate only that the Robinson-Patman Act may apply where the State, as in *Sterling*, or the municipality, as in *Hitachi*, is the victim of commercial bribery under § 2(c), 15 U. S. C. § 13(c), rather than the favored customer.

¹⁷E. Kintner, *A Robinson-Patman Primer* 224 (1979) (2d ed. 1979) ("In spite of [any] contrary indications [among state attorneys general], it is generally believed that the exemption applies to governmental purchases at any level."); W. Patman, *Complete Guide to the Robinson Patman Act* 30 (1963) (indicating the Act is inapplicable to sales to government, municipal, or public institutions); F. Rowe, *Price Discrimination Under the Robinson-Patman Act* 84 (1962) ("The preponderance of reasoned opinion treats State or municipal bodies on a par with the Federal Government's exemption."); 4 J. von Kalinowski, *Antitrust Laws and Trade Regulation* § 24.06 at 24-70 (1982) ("[T]he prevailing view is that such sales [to states and municipalities] are excluded from Robinson-Patman liability."). See also 5A Z. Cavitch, *Business Organizations* § 105D.01[8][c] (1973) (indicating that lower federal courts have generally held the Act inapplicable to sales to states and municipalities, that one lower federal court has held the

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This same understanding has been expressed in testimony before Congress. In 1967 and 1968 a congressional subcommittee conducted public hearings on the problems of small businesses in the pharmaceutical industry. The subcommittee heard testimony from both representatives of pharmaceutical manufacturers and retail pharmacists regarding the industry-wide practice of price discrimination in sales of pharmaceuticals to governmental purchasers—federal, state, county, and municipal.¹⁸ Several witnesses also directly expressed their assumption that the Robinson-Patman Act does not apply to such sales.¹⁹

Act may be applicable if the State is the disfavored customer, and that opinions among state attorneys general are divided).

Although not specifically addressing any consumption/resale distinction, a past Attorney General of the United States also has opined that purchases by state and local governments are not within the Act's prohibition against price discrimination. Report of the Attorney General Under Executive Order 10936, *Identical Bidding in Public Procurement* 11 (1962) (identical bidders on contracts with state and local governments cannot contend that the Act prohibits bidding below the schedule price, because the Act is not applicable to government contracts).

¹⁸ *Small Business Problems in the Drug Industry: Hearings Before the Subcommittee on Activities of Regulatory Agencies of the Select Committee on Small Business of the House of Representatives*, 90th Cong., 1st Sess., 48 (1967-1968) [hereinafter *1967-1968 Hearings*] (Merritt Skinner, community pharmacist); *id.*, at 258 (William Apple, executive director of the American Pharmaceutical Association); *id.*, at 296, 318-319 (Hyman Moore, H.L. Moore Drug Exchange, Inc.); *id.*, at 500 (Henry DeBoest, vice president of Eli Lilly & Co.); *id.*, at 705 (Donald van Roden, vice president and general manager of pharmaceutical operations for Smith Kline & French Laboratories); *id.*, at 792 (Joseph Ingolia, vice president and general manager of Schering Laboratories); *id.*, at 817 (Lyman Duncan, vice president of American Cyanamid Co.).

Based upon this overwhelming evidence, the Select Committee on Small Business concluded in its report to the House: "The difference between drug prices charged retailers and wholesalers as compared to those charged . . . governmental customers is extremely substantial, often being over 50 percent." H. R. Rep. No. 1983, 90th Cong., 2d Sess., 77 (1968).

¹⁹ See *1967-1968 Hearings*, at 15-16 (Earl Kintner, former FTC Commissioner, counsel for the National Association of Retail Druggists) ("When

In 1969 and 1970, the same House subcommittee investigated the problems of small businessmen under the Robinson-Patman Act. In these hearings witnesses again expressed the view that governmental purchases at any level are not covered, highlighting the problem of favorable prices on governmental purchases *for resale* and making a plea for a change in the law.²⁰

a drug supplier sells drugs to Federal, State, or municipal governmental institutions, the price charged by the supplier may be without regard to the Robinson-Patman Act, because such sales are probably exempt from the Robinson-Patman Act."); *id.*, at 731 (W. Abrahamson, president of Ortho Pharmaceutical Corp.) ("[T]he only special pricing we have ever engaged in are [*sic*] in bidding situations to [federal, state, or local government] agencies excluded from the Robinson-Patman Act."); *id.*, at 1069 (C. Stetler, president of the Pharmaceutical Manufacturers Association) ("There is nothing immoral or unlawful about incremental cost pricing in cases—such as sales to the Government . . . —where the Robinson-Patman Act does not apply.").

Even one congressman on the subcommittee expressed his understanding that the Act does not apply to governmental purchasers. See *id.*, at 1092 (Rep. Corman) ("[I]f there were no exemption under Robinson-Patman for the Government, what would be the situation as to their purchases?"). The colloquy that followed Representative Corman's question further evidences the assumption that governmental purchases are outside the scope of the Act, even in the case of resales.

"Mr. Stetler. If there was no exemption under Robinson-Patman, I presume some of these practices would be illegal under Robinson-Patman.

"Mr. Cutler. If I could try to answer that, [Representative] Corman. . . . [A]bsent the one case of these resales . . . , I suppose the lack of exemption would make no difference, because the Robinson-Patman Act would not apply for other reasons, because you are not discriminating between two people engaged in commerce and competing with one another.

"Further, there is a real question as to whether the Robinson-Patman Act applies under any circumstances where you are bidding under a competitive bid. So for both of these reasons, the answer to your question would be that the same pricing practices might still lawfully prevail under Robinson-Patman without the exemption for the government" *Ibid.* (emphasis added).

²⁰ William McCamant, Director of Public Affairs for the National Association of Wholesalers, testified:

III

The legislative history of the Robinson-Patman Act clearly reveals that Congress intended to exclude governmental entities from the Act's proscriptions to some extent. However, Congress did not focus on the issue before us and therefore did not provide a clear rationale governing coverage and noncoverage. In an area in which bright lines are needed to guide state and local governments in their purchasing prac-

"Over the years, the Robinson-Patman Act has not been extended to cover sales to the Government. In the days when Government purchases constituted a relatively small volume in the marketplace, this exemption posed few problems. But today, with the vast growth in Government purchases, Federal, State, and local, . . . the continued exemption creates many unfair competitive situations.

"We believe that Congress must turn its attention to this problem." *Small Business and the Robinson-Patman Act, Hearings Before the Special Subcommittee on Small Business and the Robinson-Patman Act of the Select Committee on Small Business of the House of Representatives*, 91st Cong., 1st Sess. 73-74 (1969-1970). See *id.*, at 76-77 (Everette MacIntyre, acting chairman of the Federal Trade Commission) (affirming that sales to the Federal Government, even in the resale context, are not subject to the Robinson-Patman Act).

Harold Halfpenny, legal counsel for the Automotive Service Industry Association, focused most precisely on the problem of which petitioners complain—i. e., competitive injury to private industry when governmental entities receive more favorable prices on purchases of commodities for resale.

"[W]hile the Act is silent on the subject, its legislative history and subsequent interpretation support the proposition that sales made to Federal or State governmental bodies are not subject to the provisions of the Act.

"This may be injurious to competition in several ways. . . .

"[T]here are 'second line' situations where competition exists between the Government and private industry in the resale of commodities.

"The Federal Trade Commission has not recommended legislation to make the Robinson-Patman Act applicable to sales to governmental purchases. However, in our opinion, Congress should consider acting on its own volition." *Id.*, at 623 (emphasis added).

tices, the majority fails to identify any principle triggering inclusion or exclusion.

Moreover, one cannot doubt that state, county, and municipal governments and manufacturers of commodities have structured their marketing relationships with each other on the longstanding assumption that the Robinson-Patman Act does not apply to those transactions. That understanding finds substantial support among the courts and commentators. State and local governments have developed programs for providing services to the public, including medical care to the indigent and the medically needy,²¹ based on the same assumption. The majority's holding that sales of commodities to state and local governments for resale in competition with private enterprise are covered by the Act will engender significant disruption—not only through government and industry reexamination and restructuring of marketing relationships, but also, unfortunately, through possible termination of services and supplies to needy citizens²² and through litigation associated with the process of reexamination.²³ The Court rests its decision primarily on one state-

²¹ See, e. g., Cal. Welf. & Inst. Code Ann. §§ 14100-14126 (1980 & Supp. 1982); Ill. Rev. Stat., ch. 23, §§ 5-1 to 5-14 (Supp. 1982-83); Mont. Code Ann. §§ 53-6-103 to 53-6-144 (1981); N.Y. Soc. Serv. Law §§ 365, 365-a (McKinney 1976 & Supp. 1982); Tex. Human Res. Code Ann. §§ 32.001-32.037 (1980); Va. Code §§ 63.1-134 to 63.1-144 (1980).

²² The administrative burden of developing internal accounting and recordkeeping procedures to segregate commodities purchased for resale, plus the additional financial strain of paying higher prices for these purchases, may induce state and local governments to terminate programs and services already in place. More significantly, however, the uncertainty generated by the majority's failure to establish clear lines of demarcation for coverage and noncoverage and the fear of exposure to treble damages liability might well cause cautious legislators facing budgetary dilemmas to eliminate these programs.

²³ I note that the Court has not indicated that today's holding will have only prospective effect.

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ment in the legislative history,²² taken in isolation from other remarks designed to assure concerned House members that the Act would *not* force the abandonment of governmental below-market buying practices which the majority's holding now calls into question. Given Congress' failure to delineate the extent of the Robinson-Patman Act's coverage or noncoverage of state and local governments, I would allow Congress to speak on this issue rather than disrupt long-standing practices and programs and judicially arm private litigants with a powerful treble damages action against these governments. Therefore, I would affirm the judgment below.

²² See *ante*, at 10.

(Slip Opinion)

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

ABBOTT LABORATORIES ET AL. v. PORTLAND RETAIL DRUGGISTS ASSN., INC.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT

No. 74-1274. Argued December 16, 1975—Decided March 24, 1976

Respondent, as assignee of more than 60 commercial pharmacies, brought this antitrust action against petitioners, 12 drug manufacturers, charging that by selling drugs to certain hospitals, each of which has a pharmacy, at prices lower than those charged to respondent's assignors, petitioners violated the Robinson-Patman Act, which makes it unlawful for one engaged in commerce to discriminate in price between different purchasers of like commodities where "the effect . . . may be substantially to lessen competition." 15 U. S. C. § 13 (a). Petitioners claimed that the challenged sales were exempt under the Nonprofit Institutions Act, which, *inter alia*, excludes from the application of the Robinson-Patman Act nonprofit hospitals' "purchases of their supplies for their own use." § 13c. The District Court ruled on the basis of the evidence adduced that the hospitals involved were nonprofit and that their drug purchases were "for their own use" within the meaning of § 13c, and granted summary judgment in favor of petitioners. The Court of Appeals vacated and remanded. While agreeing that the designated hospitals were nonprofit, that court concluded that a hospital's drugs are purchased for its "own use" only where the hospital can be said to be the consumer, *i. e.*, where dispensations are to inpatients and emergency facility patients. *Held*:

1. Section 13c does not exempt all of a nonprofit hospital's drug purchases from the Robinson-Patman Act but the exempting language must be construed as applying to what reasonably may be regarded as use *by the hospital* in the sense that such use is part of and promotes the hospital's intended institutional operation in the care of its patients. Pp. 6-12.

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Syllabus

2. Applying the foregoing rule, drug purchases by a nonprofit hospital are exempt as being for the hospital's "own use" if the drugs are dispensed:

(a) To the inpatient for use in his treatment at the hospital; the patient admitted to the hospital's emergency facility for use in his treatment there; or the outpatient for personal use on the hospital premises. Such dispensations are part of the hospital's basic function. P. 12.

(b) To the inpatient, or to the emergency facility patient, upon his discharge, and to the outpatient, all for off-premises personal use, provided these take-home dispensations are for a limited and reasonable time, as a continuation of, or supplement to, hospital treatment. Pp. 12-13.

(c) To the hospital employee or student for personal use, or for the use of his dependent. Each is a member of the hospital family and dispensation to him furthers the hospital's functions. Pp. 13-14.

(d) To the physician staff member for his personal use or the use of his dependent. Here the considerations are similar to those in (c), *supra*. Pp. 14-15.

3. Purchases for the following types of dispensation are not exempt since they are not for the hospital's "own use":

(a) To the former patient, by way of a renewal of a prescription given when he was an inpatient, an emergency facility patient, or an outpatient. The purpose of the exemption has been exceeded where the connection with the hospital has reached the refill stage. P. 13.

(b) To nondependents of those covered in ¶¶ 2 (c) and (d), *supra*. These relationships are too attenuated for the statutory benefit. Pp. 14, 15.

(c) To the walk-in customer, who has no present connection with the hospital or its pharmacy (except in the occasional emergency situation, which can be viewed as *de minimis*). Pp. 15, 16.

4. Under these standards the hospital can either put all the drugs it purchases to its "own use" exclusively, or can keep separate records for the drugs put to its "own use" and for those otherwise dispensed, making accounting submissions to the supplier for price adjustments. The supplier is protected from antitrust liability if he reasonably and noncollusively relies upon the hospital's certification as to its dispensation of drugs purchased from the supplier. Pp. 17-18.

510 F. 2d 486, vacated and remanded.

SUPREME COURT OF THE UNITED STATES

No. 74-1274

Abbott Laboratories et al.,
Petitioners,
v.
Portland Retail Druggists
Association, Inc., etc.

On Writ of Certiorari to the
United States Court of Ap-
peals for the Ninth Circuit.

[March 24, 1976]

MR. JUSTICE STEWART, with whom MR. JUSTICE BRENNAN joins, dissenting.

It is common ground in this case that the dispensation of pharmaceutical products for consumption by a hospital's patients upon the hospital's premises constitutes the hospital's "own use" of the products within the meaning of 15 U. S. C. § 13c. The controversy concerns the various other "uses" of these products catalogued in the Court's opinion. *Ante*, pp. 6-7. As to those uses the Court of Appeals expressed its views as follows:

"We may concede that in these respects distribution by the hospitals can be justified as a proper and useful community service and thus can be regarded as a proper hospital function. It is not, however, the hospitals' 'own use.' . . . The purpose for which these supplies are purchased—the use to which they are to be put—is their consumption. Section 13c can apply here only to cases in which a hospital can be said to be the consumer. It cannot apply to cases of resale by the hospital to a private consumer.

"The hospitals here are (quite properly) accommodating patients, staff and strangers with means whereby they can conveniently purchase for *their* use. The question is not whether the hospitals can

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continue to provide this useful community service. The question is whether in providing it they may acquire the drugs for such resale at an acquisition price that discriminates against local retail druggists. We hold that they may not." 510 F. 2d, at 489.

I agree with the Court of Appeals and would affirm its judgment.

NOTICE : This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 74-1274

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[March 24, 1976]

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

The Robinson-Patman Price Discrimination Act (Robinson-Patman), adopted in 1936, 49 Stat. 1526, in general makes it unlawful for one engaged in commerce to discriminate in price between different purchasers of like commodities where, among other things, "the effect of such discrimination may be substantially to lessen competition." 15 U. S. C. § 13 (a). The Nonprofit Institutions Act, adopted only two years later, in 1938, 52 Stat. 446, exempts from the application of Robinson-Patman "purchases of their supplies for their own use by schools . . . hospitals, and charitable institutions not operated for profit." 15 U. S. C. § 13c.¹

This case concerns nonprofit hospitals' purchases of products at favored prices from pharmaceutical companies. The issue is the proper construction of the

¹ 15 U. S. C. § 13c.

"Nothing in sections 13 to 13b and 21a of this title, shall apply to purchases of their supplies for their own use by schools, colleges, universities, public libraries, churches, hospitals, and charitable institutions not operated for profit."

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phrase "purchases of their supplies for their own use," as it appears in the Nonprofit Institutions Act, and the consequent extent the hospitals' purchases are exempt from the proscription of Robinson-Patman.

I

Petitioners are 12 manufacturers of pharmaceutical products. Respondent, an Oregon nonprofit corporation and assignee of more than 60 commercial pharmacies doing business in the metropolitan Portland, Oregon area, instituted this action against petitioners in the United States District Court for the District of Oregon for violations of the federal antitrust laws. Treble damages and injunctive relief were sought.

The amended complaint asserted five causes of action. Only one of the five (the second) is presently before us.² In this claim the respondent alleged that in selling pharmaceutical products petitioners discriminated between nonprofit hospitals, on the one hand, and commercial pharmacies (regular drug stores), including respondent's assignors, on the other. As an affirmative defense, petitioners pleaded that their sales of pharmaceutical products to nonprofit hospitals were exempt from Robinson-Patman under the Nonprofit Institutions Act.

The parties engaged in discovery as to the nonprofit status and drug-dispensing practices of 14 designated metropolitan Portland area institutions that operate as

² Causes of action based on discrimination in sales to city, county, and state governments, and to the Federal Government (the third and fourth causes of action asserted in the amended complaint, Rec. 61-62) were dismissed for failure to state a claim. App. 292. A cause of action based on discrimination in sales to proprietary hospitals and commercial entities, and one that the alleged discriminations were the product of a conspiracy (the amended complaint's first and fifth causes of action, Rec. 52-61, 62-63), remain pending.

SUPREME COURT OF THE UNITED STATES

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peals for the Ninth Circuit.

[March 24, 1976]

MR. JUSTICE MARSHALL, concurring.

While I join the Court's opinion, I wish to add a word about the applicability of the exemption provided by the Nonprofit Institutions Act. To my mind, the key to the Act is that it exempts from the Robinson-Patman Act not only an itemized list of institutions, but also all "charitable institutions not operated for profit." 15 U. S. C. § 13c. This suggests to me that the named institutions—schools, colleges, universities, public libraries, churches, and hospitals—were not intended to be limited to their traditional activities in qualifying for the exemption, but may expand those activities and still qualify so long as any new activities for which exempted supplies are purchased are charitable and not operated for profit.

I agree with the Court that the exemption is not "to be applied and expanded automatically to whatever new venture the nonprofit hospital finds attractive in these changing days." *Ante*, at 11. But I believe the exemption is applicable to any new venture the hospital finds attractive and that is both charitable and not operated for profit. There is no suggestion—nor could one be made—that the activities the Court today finds outside the exemption fall within this category,* so there is no

*This case would be much more difficult for me if the hospitals

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need to address this problem here. But I write to emphasize that I do not read the Court's opinion as foreclosing hospitals—or other exempted institutions—from expanding their charitable activities in highly untraditional ways and still qualifying for the exemption.

Likewise, I agree with the Court that the proper inquiry in this case is whether each kind of drug sale by the hospital "is a part of and promotes the hospital's intended institutional operation in the care of persons who are its patients." *Ante*, at 11–12. However, when a nonprofit institution makes sales for profit, as here, analysis is furthered, I suggest, by recognition of the purpose of the "own use" limitation.

Since all charitable institutions are covered by the Act, the purpose quite obviously is not to freeze a particular charitable institution into a particular kind of charity. Rather, as I understand it, the purpose of the limitation is generally to preclude the institution from taking advantage of its antitrust exemption by buying low-cost supplies solely for the purpose of reselling them at a profit. That is, Congress was primarily interested in directly aiding nonprofit institutions by lowering their operating expenses, but not interested in indirectly aiding such institutions by providing them with the means of raising additional money—particularly when such resales of supplies would put the institution in competition with retail businesses not eligible for the exemption. While I do not believe Congress meant to preclude profit-making sales in the course of the institution's charitable activities—and so I agree that the Court's inquiry is the correct one—I suggest that the nexus between particular

involved did not all make profits on the sale of drugs to outsiders. *Ante*, at 4. If they did not, we would have to determine in each case whether such sales, even if not within the hospital's institutional function, nonetheless constituted a "charitable" venture of their own.

ABBOTT LABS. v. PORTLAND RETAIL DRUGGISTS 5

of the products purchased (85% to 95%), namely, those for the bed patient and for the patient receiving treatment in the hospitals' emergency facilities, were "clearly" for the hospitals' use, within the meaning of the Non-profit Institutions Act, App. 283; that "out-patient treatment," whether "initial or repeated," was not outside that Act merely because there has been a "change in the distribution of health care" whereby the percentage of outpatient treatment increased since the statute was passed in 1938, *id.*, at 284; that "take-home drugs" were within the "clear meaning" of the statute, *ibid.*; that drugs furnished to employees, staff physicians, and other members of the staff, while presenting "some mild degree of question," nevertheless were "for the use of the hospital," *id.*, at 285; and that the situation with respect to walk-in patients was insufficient in amount to "justify withdrawing" the statute's exemption, *ibid.*

The Court of Appeals agreed that the inpatient and emergency facility situations "cover by far the greater part of hospital distribution," and that "such dispensing of drugs in the course of treatment in the hospital is the hospitals' [*sic*] own use." 510 F. 2d, at 489. The court recited petitioners' asserted justifications for the other types of sales "as proper hospital functions": the need of the departing inpatient for take-home drugs; the continuation at home of the patient's treatment begun earlier in the hospital; the sales to employees as being pursuant to collective-bargaining agreements; the sales to students as being aspects of the hospital's educational programs; the sales to physicians as being perquisites of hospital staff membership; the limitation of walk-in sales to instances where, at the time, the needed drugs could not be obtained elsewhere; the hospital's position "as a center for the provision of a full range of health services"; and "a decent regard for the needs of the community." *Ibid.*

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But, conceding that "distribution by the hospitals can be justified as a proper and useful community service and thus can be regarded as a proper hospital function," the Court of Appeals concluded that this was not necessarily "the hospitals' 'own use.'" Instead, said the court, hospital use under § 13c was limited to cases where the hospital can be said to be the consumer, that is, to those cases where the dispensations of drugs were to inpatients and emergency facility patients. The concept could not apply "to cases of resale by the hospital to a private consumer." Accordingly, as to such sales, the hospital may not acquire the pharmaceutical products "at an acquisition price that discriminates against local retail druggists." *Ibid.*

III

We, too, find it convenient to view the hospitals' sales and dispensations of the pharmaceutical products purchased from petitioners as falling into several categories.⁶ We divide them as follows:

1. To the inpatient for use in his treatment at the hospital. For present purposes, we define an inpatient as one admitted to the hospital for at least overnight bed occupancy.⁷

⁶ The record does not show that each of the designated hospitals made dispensations in each category. It does indicate that dispensations in each category were made by the hospitals considered as a group. Some hospitals refused to make certain types of dispensations. It would serve no useful purpose for us to describe the extent to which each individual hospital made dispensations in the several categories.

⁷ A patient admitted for overnight bed occupancy, in the estimation of the several affiants whose affidavits appear in the record, clearly is an "inpatient." Some would carry the description further to include a patient admitted only for day surgery, or one who remains 12 hours or more, irrespective of overnight bed occupancy. In view of our disposition of the case, these distinctions are of no consequence here.

2. To the patient admitted to the hospital's emergency facility for use in the patient's treatment there. A patient in this category may or may not become an inpatient, as defined in the preceding paragraph.

3. To the outpatient for personal use on the hospital premises. For present purposes, we define an outpatient as one (other than an inpatient or a patient admitted to the emergency facility) who receives treatment or consultation on the premises.

4. To the inpatient, or to the emergency facility patient, upon his discharge and for his personal use away from the premises.

5. To the outpatient for personal use away from the premises.

6. To the former patient, by way of a renewal of a prescription given when he was an inpatient, an emergency facility patient, or an outpatient.

7. To the hospital's employee or student for personal use or for the use of his dependent.⁷

8. To the physician who is a member of the hospital's staff, but who is not its employee, for personal use or for the use of his dependent.

9. To the physician, who is a member of the hospital's staff, for dispensation in the course of the physician's private practice away from the hospital.

10. To the walk-in customer who is not a patient of the hospital.⁸

⁷ The record seemingly contains no reference to a dispensation to a special duty nurse, chaplain, or similar nonemployee professional, on duty at the hospital. We place any dispensation of this type in the same category as one to the hospital's employee or student.

⁸ This division into 10 categories may not be exhaustive. It appears to cover, however, the several types of dispensations indicated by the record.

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This division into categories reveals, of course, that we are concerned with linedrawing. The demarcation is somewhat simplified, on this record, by a concession on the part of the respondent. The respondent agrees with the Court of Appeals that the dispensing of drugs "in the course of treatment in the hospital is the hospitals' [sic] own use," regardless of whether the patient is technically described as an outpatient or as an inpatient. It does not matter, the respondent says, "whether the patient is occupying a bed or not"; thus, a "day surgery patient receiving medication while being treated in the hospital would be covered [that is, the sale to him would be exempt] whether in bed or not, as would one receiving a shot or pill while standing upright or otherwise in the outpatient clinic." Brief for Respondent 11. See also Tr. of Oral Arg. 29.

This concession, then, covers the above listed categories 1, 2, and 3. We hasten to add, however, that if the respondent had made no concession as to these three categories, we would have reached the same result, for it seems to us to be very clear that a hospital's purchase of pharmaceutical products that are dispensed to and consumed by a patient on the hospital premises, whether that patient is bedded, or is seen in the emergency facility, or is only an outpatient, is a purchase of supplies for the hospital's "own use," within § 13c. In our view, as the respondent's concession indicates, this is so clear that it needs no further explication.

Before we turn to the remaining categories, we should state that we recognize, as the parties do, that the concept of the nonprofit hospital and its appropriate and necessary activity has vastly changed and developed since the enactment of the Nonprofit Institutions Act in 1938. The intervening decades have seen the hospital assume a larger community character. Some hospitals, indeed,

truly have become centers for the "delivery" of health care. The nonprofit hospital no longer is a receiving facility only for the bedridden, the surgical patient, and the critical emergency. It has become a place where the community is readily inclined to turn, and—because of increasing costs, physician specialization, shortage of general practitioners, and other factors—is often compelled to turn, whenever a medical problem of import presents itself. The emergency room has become a facility for all who need it and it no longer is restricted to cases previously authorized by members of the staff. And patients that not long ago required bed care are often now treated on an ambulatory and outpatient basis. See *Eastern Kentucky Welfare Rights Organization v. Simon*, 165 U. S. App. D. C. 239, 249; 506 F. 2d 1278, 1288 (1974), cert. granted, 421 U. S. 975 (1975); Brodie and Graber, *Institutional Pharmacy Practice in the 1970's*, 28 *Am. J. Hosp. Pharm.* 240, 241 (1971).

IV

It has been said, of course, that the antitrust laws, and the Robinson-Patman Price Discrimination Act in particular, are to be construed liberally, and that the exceptions from their application are to be construed strictly. *United States v. McKesson & Robbins*, 351 U. S. 305, 316 (1956); *FMC v. Seatrain Lines, Inc.*, 411 U. S. 726, 733 (1973); *Perkins v. Standard Oil Co.*, 395 U. S. 642, 646-647 (1969). The Court has recognized, also, that Robinson-Patman "was enacted in 1936 to curb and prohibit all devices by which large buyers gained discriminatory preferences over smaller ones by virtue of their greater purchasing power." *FTC v. Broch & Co.*, 363 U. S. 166, 168 (1960); *FTC v. Fred Meyer, Inc.*, 390 U. S. 341, 349 (1968). Because the Act is remedial, it is to be construed broadly to effec-

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tuate its purposes. See *Tcherepnin v. Knight*, 389 U. S. 332, 336 (1967); *Peyton v. Rowe*, 391 U. S. 54, 65 (1968). Implied antitrust immunity is not favored. *United States v. National Assn. Securities Dealers*, 422 U. S. 694, 719 (1975). "[O]ur cases have repeatedly established that there is a heavy presumption against implicit [anti-trust] exemptions." *Goldfarb v. Virginia State Bar*, 421 U. S. 773, 787 (1975); *United States v. Philadelphia Nat. Bank*, 374 U. S. 321, 350-351 (1963). And the focus of Robinson-Patman is on competition "at the same functional level." *FTC v. Sun Oil Co.*, 371 U. S. 505, 520 (1963).

But the legislative history of the Nonprofit Institutions Act indicates clearly that that Act was concerned with the suspicion that Robinson-Patman, at the time just recently enacted, actually might operate to outlaw price favors that sellers would wish to grant to eleemosynary institutions. S. Rep. No. 1769, 75th Cong., 3d Sess., 1 (1938); H. R. Rep. No. 2161, 75th Cong., 3d Sess., 1 (1938). The parties here seek to utilize this legislative history in opposite ways. The respondent asserts that the statutory assurance of exemption "was never intended to countenance a mass invasion of the retail drug sale market by hospitals," Brief for Respondent 34, and that what Congress had in mind was "the role traditionally occupied by hospitals," *id.*, at 35. The petitioners assert that the 1933 statute "was written to assist a wide range of nonprofit institutions to operate at the lowest possible cost in the public interest," Brief for Petitioners 17, and that the focus was on the character of the institution, not on the particular features of its program, and not only on those institutions that operated at a loss, *id.*, at 17-18.

We are not fully persuaded by either view. The modern American hospital developed from an institution

originally intended for the sick poor. See *Eastern Kentucky Welfare Rights Organization v. Simon*, 165 U. S. App. D. C., at 249; 506 F. 2d, at 1288; E. Fisch, D. Freed, and E. Schachter, *Charities and Charitable Foundations* § 322 (1974); Bromberg, *The Charitable Hospital*, 20 Cath. U. L. Rev. 237, 238-240 (1970). Language in the bill which became the 1938 Act, that would have exempted only sales to nonprofit institutions "supported in whole or in part by public subscriptions," was deleted, 83 Cong. Rec. 6065 (1938), and the Act's exemption provision was not so restricted and confined. We thus do not relate the exemption to what might be described as the nonprofit hospital's original or "traditional" status. On the other hand, there is nothing in the Act that indicates that its exemption provision is to be applied and expanded automatically to whatever new venture the nonprofit hospital finds attractive in these changing days. The Congress surely did not intend to give the hospital a blank check. Had it so intended, it would not have qualified purchases by nonprofit institutions in the way it did in § 13c. See H. R. Rep. No. 1983, 90th Cong., 2d Sess., 78-79 (1968). We are concerned, after all, with an exemption from an antitrust statute, and the accepted general principles, hereinabove set forth, do have application even in the nonprofit hospital context.

We therefore conclude that the exemption provision of the Nonprofit Institutions Act is a limited one; that just because it is a nonprofit hospital that is purchasing pharmaceutical products does not mean that all its purchases are exempt from Robinson-Patman; that the test is the obvious one inherent in the language of the statute, namely, "purchases of their supplies for their own use"; and that "their own use" is what reasonably may be regarded as use *by the hospital* in the sense that such use

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is a part of and promotes the hospital's intended institutional operation in the care of persons who are its patients. This implies the limitation and it turns the measure naturally from the purchase to the use, as § 13c requires. In this focus we consider the several categories listed above.

V

1, 2, and 3. As to these three categories, we reiterate our conclusions already enunciated in the light of the concession by the respondent. Dispensation to the bed-occupying inpatient and to the patient at the hospital's emergency facility, in either case for use on the hospital premises, is a part of the institution's basic function, and is dispensation for the hospital's "own use." That it is the patient rather than the hospital that consumes is not determinative, and, indeed, the respondent here does not contend otherwise. A like result follows with respect to dispensation to the hospital's outpatient when that patient uses the pharmaceutical product on the hospital's premises.

4 and 5. The take-home prescription, usually a continuance of, or supplement to, what has been prescriptively administered at the hospital while the recipient was an inpatient, emergency facility patient, or outpatient, takes us, to be sure, one small step beyond and outside the hospital's door. The patient is released from care to continue his treatment and recuperation under something less than the hospital's emergency or routine intensive, regular, or, even, more casual care (if it offers that type), and less than its consultative service at its outpatient facility. The release from the hospital environment into the home is the step next in the chain of treatment on the patient's way to his resumption of normal activity completely free of treatment. The medical supervision and the hospital's participation in it to

this point, at least, although approaching an end, are continuous and real, and are distinct parts of the transition from hospital care to home care. We therefore conclude that the genuine take-home prescription, intended, for a limited and reasonable time, as a continuation of, or supplement to, the treatment that was administered at the hospital to the patient who needed, and now continues to need, that treatment, is for the hospital's "own use." We therefore disagree with the Court of Appeals as to categories 4 and 5. We feel that a contrary ruling on our part would unduly and undeservedly emphasize the doorsill of the hospital, and that to draw a line at that threshold would be arbitrary and not consistent with congressional intent. In these instances, the hospital's "own use" of the pharmaceutical products extends realistically and not inappropriately somewhat beyond that threshold.

6. We conclude, however, that the refill for the hospital's former patient is on the other side of the line that divides that which is in the hospital's "own use" from that which is not. Inevitably, in accord with the test above set forth, there comes a point where the dispensation of pharmaceutical products is not in the institution's "own use." That point, we feel, is positioned short of the refill. Continuation of a drug's use for some time after initial prescription at the hospital may well be indicated for the particular patient, but, except for the limited take-home prescription referred to above, it is not the hospital's "own use," and it certainly is not for its "own use" forever just because it originated under hospital auspices. We conclude that the statute's limitation has been exceeded when the connection with the hospital has become as attenuated as it is at the refill stage.

7. Dispensation to the hospital's employee or to its student for the purchaser's personal use or for the use of his dependent poses a somewhat different problem. A

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hospital is an organization populated by persons rendering essential services of various kinds. The hospital's employees enable it to function. The hospital pharmacy is but a part of the whole; the employee and his services are other parts. And to the extent the institution has students on the medical and hospital scene—interns, persons in the hospital's nursing, practical nursing, and nurse's aid programs, those in paramedical, chaplaincy, and administrative fields, and the like—the connection with the hospital's purposes and its activities is obvious and institutionally intimate. We conclude, therefore, that dispensation by the pharmacy to the hospital's employee and to its student, each of whom, literally, is a member of the hospital family, for his own use or for the use of his dependent, enhances the hospital function and qualifies as being in the hospital's "own use," within the meaning of § 13c.⁹ But we draw the line between dispensation for the employee's or the student's personal use, or for the use of his dependent, on the one hand, and that for the use of another, even a nondependent family member, on the other.

8 and 9. What we have said in the preceding paragraph applies with equal force to dispensation to a physician member of the staff for his personal use or for the personal use of his dependent. The physician staff member, though not an employee in the technical sense of being full time in the hospital's service and on its payroll, nevertheless is vital to its existence. It is he who supplies the patient and who engages, perhaps directly and at least to some extent through the staff organization, in the formulation of the hospital's professional and operative policies. His activity at the hos-

⁹ The fact that, with respect to employees, the availability of the hospital pharmacy might be the compelled subject of a collective-bargaining agreement, in our view, cannot be controlling.

pital is in the hospital's use—its very purpose for existence—and dispensation to the physician and his dependent, we think, is in the hospital's "own use," within § 13c.

We again draw the line, however, when the physician's acquisition from the hospital pharmacy is not for his personal use or that of his dependent, or is not for the hospital. To the extent that the physician utilizes his proximity to the hospital pharmacy, and it permits him so to do, for other persons or other uses—even, as this record occasionally intimates, for dispensation in that portion of his private practice unconnected with the hospital—the requirement of the hospital's "own use" is not fulfilled. Here again the relationship is too attenuated for the statutory benefit, and we hold that § 13c definitely is not satisfied.

10. The walk-in prescription buyer for the most part affords little difficulty for us in the context of § 13c. Even though one acknowledges the full weight of the argument that the modern hospital is a different institution from what it was when the Nonprofit Institutions Act was adopted in 1938, and that increasingly it has become a focus of health care in the community, the extension of § 13c to the walk-in patient, who has no present connection with the hospital and its pharmacy other than as a place to have his prescription filled, would make the commercially advantaged hospital pharmacy just another community drug store open to all comers for prescription services and devastatingly positioned with respect to competing commercial pharmacies. This would extend the hospital's "own use" concept beyond that contemplated by Congress in § 13c.

We therefore hold that the walk-in buyer generally is not within the statute's exemption. We recognize, however, that there may be an occasion when the hospital pharmacy is the only one available in the com-

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munity to meet a particular emergency situation. The respondent seeks to counter this possibility with a telephone book yellow-page reference to the providing of 24-hour service, and of some emergency or delivery service, by certain metropolitan Portland retail pharmacies. Brief for Respondent 56. That may be. We are content, however, to conclude that the occasional emergency is *de minimis*, in any event, and that its presence solitarily would not trigger litigation of the present kind. So long as the hospital pharmacy holds the emergency situation within bounds, and entertains it only as a humanitarian gesture, we shall not condemn the hospital and its suppliers to a Robinson-Patman violation because of the presence of the occasional walk-in dispensation of that type.¹⁰

¹⁰ We referred above, in n. 4, to *Logan Lanes, Inc. v. Brunswick Corp.* The parties, in their respective ways, seek to make as much as possible of that decision. *Logan Lanes* was a treble-damage suit centering in the sale by Brunswick, to a Utah State Board, of bowling lanes and related equipment at prices lower than Brunswick charged Logan for similar equipment. The items purchased by the Board were installed in a state university's student union building, and, while they were "primarily for the use of students, faculty and staff of the University," were also used by members of the public. 378 F. 2d, at 214. The public use during the 20 months following installation, according to affidavits presented by Brunswick, amounted to 2,934 lines out of a total of 128,349. The trial court granted Brunswick's motion for summary judgment. One ground for this ruling was that the purchase was exempt under § 13c. The Ninth Circuit affirmed. It refused to restrict the statute's use of the term "supplies" to consumables and noncapital items and, instead, held that the term embraced anything required to meet the qualified institution's needs. It concluded that the exact amount of public use was immaterial and that, even assuming "the public made substantial use of the University bowling facilities," 378 F. 2d, at 217, the purchases in question were made by the nonprofit university for its own use. The situation presented by *Students Book Co. v. Washington Law Book Co.*, 98 U. S. App. D. C. 49; 232 F. 2d 49

VI

The petitioners suggest that a decision holding some dispensations by the nonprofit hospital not to be exempt establishes an objectionable and unworkable standard for hospitals and their suppliers because it "requires a segregation of drugs or accounting of their use that can be achieved only through the institution of clumsy and expensive dual supply or tracing systems to regulate and account for the use of drugs." Brief for Petitioners 28. They suggest the undesirability of a supplier's "controlling the disposition of merchandise in the hands of a purchaser," citing *United States v. Arnold, Schwinn & Co.*, 388 U. S. 365, 379 (1967), and they speak of the supplier's "retroactive exposure to claims." Brief for Petitioners 29.

Petitioners' concern is understandable, but we feel that

(1955), cert. denied, 350 U. S. 988 (1956), also cited by the parties here, was distinguished.

The latter case concerned sales of law books to self-sustaining campus bookstores for resale at a profit. The Court of Appeals held, *id.*, at 50-51, n. 5; 232 F. 2d, at 50-51, n. 5, that these were not sales to universities "for their own use," within the meaning of § 13c. The defendant, however, prevailed on another ground.

We agree with the court in the *Students Book Co.* case that the purchases challenged there were not purchases by a nonprofit institution of the type to which § 13c relates. Those in *Logan Lanes*, in contrast, were. The Ninth Circuit apparently would distinguish *Logan Lanes* from the present case on the ground that "[p]lant equipment acquired for a university's own use cannot be segregated from that acquired for use by others, since the same equipment serves both uses." 510 F. 2d, at 490. It went on to say that the situation "of supplies acquired for consumption . . . is otherwise." *Ibid.* The court regarded the present case as factually similar to *Students Book Co.* As we have just stated, however, we are in accord with the District of Columbia Circuit's characterization of the bookstore purchases as not being transactions with the universities at all, but with the campus bookstores for resale at the latter's profit.

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it is overstated. Looking at the problem from the point of view of the purchasing hospital, two alternatives, and perhaps more,¹¹ are presented. The first, and easier, is for the hospital pharmacy *not* to dispense in any way hereinabove held to be outside the exemption of § 13c. The second is for the pharmacy to do exactly what the petitioners deplore, namely to establish a recordkeeping procedure that segregates the nonexempt use from the exempt use. This would be supplemented by the hospital's submission to its supplier of an appropriate accounting followed by the price adjustment that is indicated. This, to be sure, is cumbersome, but it obviously is the price the Congress has exacted for the benefits bestowed by the controlling legislation, and it should be no more cumbersome than the accounting demands that are made on commercial enterprises of all kinds in our complex society of today.

The supplier, on the other hand, properly may expect to be protected from antitrust liability for reasonable and noncollusive reliance upon its hospital customer's certification as to its dispensation of the products it purchases from the supplier. But it is not unreasonable to expect the supplier to assume the burden of obtaining the certification when it seeks to enjoy, with the institutional purchaser, the benefits provided by § 13c. It clearly does this with respect to responsibility for identification of its purchaser under that statute's standard, and little additional burden is imposed if it is required to take the small second step of routinely obtaining a representation from its hospital customer as to the use of the products purchased.

¹¹ Our reference to two alternatives is not meant to be exclusive. Imaginative suppliers and purchasers may well come up with other and better means to alleviate whatever routine record keeping details and burdens may exist.

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The judgment of the Court of Appeals is vacated and the case is remanded for further proceedings consistent with this opinion. Costs are allowed to petitioners to the extent of 50%.

It is so ordered.

MR. JUSTICE STEVENS took no part in the consideration or decision of this case.

nonprofit hospitals. Affidavits were obtained and filed. Petitioners, as defendants, pursuant to Fed. Rule Civ. Proc. 56 (b), then moved for summary judgment on the amended complaint's second cause of action. App. 68.

The District Court, by an opinion delivered orally, ruled that all the designated institutions were nonprofit hospitals, and that their purchases of pharmaceutical products from petitioners were purchases of supplies "for their own use," within the language of 15 U. S. C. § 13c, and thus were exempt from the restrictions of Robinson-Patman. The court concluded, accordingly, that there was no issue as to any material fact with respect to the hospitals' nonprofit status or their use of the pharmaceutical products they purchased, and granted summary judgment in favor of the petitioners on the respondent's second cause of action. App. 278-288, 290-292.

The District Court, App. 292, certified its judgment under 28 U. S. C. § 1292 (b), and the United States Court of Appeals for the Ninth Circuit permitted the interlocutory appeal to be taken. The Court of Appeals, while rejecting respondent's contentions that the designated hospitals did not qualify for exemption under § 13c,³ nevertheless vacated the District Court's judgment and remanded the case for further proceedings. 510 F. 2d 486 (1974).

³ The sole exception was Bess Kaiser Hospital. As to this institution, the Court of Appeals concluded that certain factors "appear to present disputed issues of fact," and that the "proper legal standard" for determining whether that hospital was "'not operated for profit'" could not be developed "on the limited record" before the court. The issue, therefore, was to be resolved on remand. 510 F. 2d 486, 488 (CA9 1974). No review of this aspect of the Court of Appeals' judgment has been sought, and that detail is not before us. Neither are we confronted here with an issue as to the nonprofit status, within § 13c, of the other 13 hospitals.

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Because of the importance of the issue in the context of the modern nonprofit hospital, with its expanding service to the community, as compared with hospital operations of some years ago, and because of the obvious need for a definitive construction of language in the Nonprofit Institutions Act,⁴ we granted certiorari. 422 U. S. 1040 (1975).

II

The pertinent facts are not really in dispute. The petitioners, admittedly, sell their pharmaceutical products to the designated Portland hospitals at prices less than those that govern petitioners' sales of like products to the respondent's assignors who are commercial pharmacists in Portland. The respective hospitals in turn dispense the pharmaceutical products they have so purchased from the petitioners. The application of Robinson-Patman to this situation is conceded except to the extent the exemption provision of the Nonprofit Institutions Act applies. The controversy, thus, comes into clear focus.

Each of the designated hospitals has a pharmacy. It is a separate department of the hospital. Its operation produces revenue in excess of costs. The net accrues to the hospital's benefit, is utilized for the institution's general purposes, and thus supports other activities of the hospital.

The District Court, App. 283-285, and the Court of Appeals, 510 F. 2d, at 489, each perceived various categories of dispensations by the hospital pharmacies of the pharmaceutical products purchased from petitioners. But the District Court, in sustaining petitioners' motion for summary judgment, observed that "the vast majority"

⁴ See the same Court of Appeals' decision in *Logan Lanes, Inc. v. Brunswick Corp.*, 378 F. 2d 212 (CA9), cert. denied, 389 U. S. 898 (1967).

sales and those activities should be particularly closely scrutinized when a profit is made to assure that the sales are not made primarily for moneymaking purposes. Thus, sales only arguably within the scope of the institution's charitable activities might be exempted when made on a nonprofit basis and not exempted when made for profit. After analysis with this balancing factor in mind, I agree with the lines drawn by the Court and concur in its opinion.

ABBOTT LABS. v. PORTLAND RETAIL DRUGGISTS iii

Syllabus

BLACKMUN, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, MARSHALL, POWELL, and REHNQUIST, JJ., joined. MARSHALL, J., filed a concurring opinion. STEWART, J., filed a dissenting opinion, in which BRENNAN, J., joined. STEVENS, J., took no part in the consideration or decision of the case.

OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 82-877

TITLE JEFFERSON COUNTY PHARMACEUTICAL ASSOCIATION, INC.
Petitioner v. ABBOTT LABORATORIES, ET AL.

PLACE Washington, D. C.

DATE November 8, 1982

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(202) 628-9300
440 FIRST STREET, N.W.

IN THE SUPREME COURT OF THE UNITED STATES

JEFFERSON COUNTY PHARMACEUTICAL :

ASSOCIATION, INC., :

Petitioner :

v. : No. 81-827

ABBOTT LABORATORIES ET AL. :

Washington, D.C.

Monday, November 8, 1982

The above-entitled matter came on for oral argument
before the Supreme Court of the United States at 2:01
p.m.

APPEARANCES:

JOE L. TUCKER, JR., ESQ., Bessemer, Alabama;
on behalf of Petitioner.

DAVID KLINGSBEPG, ESQ., New York, New York; on behalf
of Respondent.

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P R O C E E D I N G S

1
2 CHIEF JUSTICE BURGER: We will hear arguments
3 next in Jefferson County Pharmaceutical against Abbott.
4 Mr. Tucker, I think you may proceed whenever you're
5 ready.

6 ORAL ARGUMENT OF JOE L. TUCKER, JR., ESQ.

7 ON BEHALF OF THE PETITIONER

8 MR. TUCKER: Mr. Chief Justice, and may it
9 please the Court:

10 This case involves the issue of whether or not
11 the prohibitions of the Robinson-Patman Act apply to
12 sales of drugs to governmental agencies where those
13 governmental agencies act in direct competition with
14 private enterprise. That is, are agencies of Jefferson
15 County, Alabama and the Board of Trustees of the
16 University of Alabama exempt per se from the application
17 of the Robinson-Patman Act, even though they compete
18 with privately-owned enterprises; in particular in this
19 case, retail pharmacists.

20 QUESTION: I suppose on the status of this
21 case, which was decided basically on the basis of the
22 complaint, we have no idea what percentage of the
23 pharmaceutical products were sold to indigent sick or
24 what part to the public in general.

25 MR. TUCKER: Justice O'Connor, we do not have

1 any firm statistics with that regard, although a
2 thorough investigation was made prior to filing the
3 complaint, and that investigation did reveal plenty of
4 facts sufficient to substantiate the complaint, with the
5 exception, of course, the ruling of the district court.

6 QUESTION: Would you agree that many states or
7 local governments in states do and have traditionally
8 undertaken to provide medical care and services to the
9 indigent sick?

10 MR. TUCKER: I would agree, Justice O'Connor,
11 that many states have undertaken to provide care to the
12 indigent sick. However, I will not agree that providing
13 of health care services is a traditional government
14 function. I would also not agree --

15 QUESTION: You would concede that it is in
16 some states, I suppose; those who since statehood have
17 assumed that responsibility?

18 MR. TUCKER: I agree that some states have
19 assumed part of that responsibility, but I could not
20 agree that it was a traditional governmental function of
21 states or counties to provide --

22 QUESTION: Even in states which have done it
23 since statehood?

24 MR. TUCKER: Well, Your Honor, I state this
25 based on not only -- with regard to indigent services,

1 that may be true. But in our case, the allegations were
2 going not just to services for the indigent, but to the
3 general public as a whole; paying persons as well as
4 those on Medicaid, and drugs being purchased by Medicaid.

5 This case began in 1978 when Jefferson County
6 Pharmaceutical Association filed suit in the United
7 States District Court of the Northern District of
8 Alabama seeking injunctive relief and treble damages
9 against 15 drug manufacturers, and Jefferson County and
10 the Board of Trustees of the University of Alabama
11 Medical School.

12 The two hospitals, Jefferson County's
13 charitable institution, Cooper Green Hospital, and the
14 University of Alabama Hospital were operating pharmacies
15 in direct competition with private retail pharmacists.
16 I think it's important to note where the pharmacy was .
17 with regard to the one operated by the University of
18 Alabama.

19 The University of Alabama Medical Center has a
20 hospital and that hospital has a pharmacy approximately
21 on the 15th and 16th floors. That pharmacy was not the
22 one selling drugs to the general public, but a separate
23 pharmacy located away from the hospital, at street
24 level, nice, comfortable chairs in the lobby for people
25 to come in and wait on their prescriptions to be filled

1 off the street, the general public, to be served.

2 All of the defendants filed motions to dismiss
3 claiming that the sales to governmental agencies were
4 exempt from the application of the Robinson-Patman Act.
5 The district court ruled in favor of the defendants and
6 held that sales to the county and state agencies'
7 pharmacies were beyond the reach of the Robinson-Patman
8 Price Discrimination Act without regard to 15 USC 13c,
9 which is the Non-Profit Exemption Act.

10 Petitioner appealed to the Fifth Circuit Court
11 of Appeals, now the Eleventh Circuit, and that court
12 affirmed the district court without opinion. Just
13 noting the decision of the district court. However,
14 Judge Clark wrote a dissenting opinion stating that the
15 court had created a near-exemption to the Act. He
16 stated that this exemption allowed governmental agencies
17 to compete in the private, proprietary sector of
18 commerce, and use its superior buying power against
19 businessmen operating private, retail drug stores.

20 First of all, purchases for resale -- that's
21 the key here in this case. This case is very similar,
22 of course, to Abbott Laboratories versus Portland Retail
23 Druggists Association, where this Court held that the
24 Robinson-Patman Act applied to sales to private
25 hospitals. That case, of course, did not reach the

1 issue here where -- that case, as I understand it, there
2 were not -- it was not before this Court the issue of
3 governmental agencies selling to general public.

4 The antitrust laws do apply to
5 anti-competitive conduct of state and local governments
6 when engaged in proprietary functions. This has been
7 cited in the City of Lafayette versus Louisiana Power
8 where this Court held that the word "persons" as used in
9 the antitrust laws, includes states and their political
10 subdivisions.

11 QUESTION: Mr. Tucker, if you prevail here,
12 will there be any spill-over effect on military
13 exchanges?

14 MR. TUCKER: No, sir, I don't think that that
15 would apply. The case --

16 QUESTION: Why?

17 MR. TUCKER: The case of Champaign-Urbana News
18 I believe spoke to that issue, a similar issue, except
19 that in that case, Champaign-Urbana News sought to apply
20 the Robinson-Patman Act to the Secretary of the Army and
21 Secretary of the Air Force. And of course, this Court
22 held that it could be not applied; that the Secretary of
23 Army and the Secretary of the Air Force were immune.

24 QUESTION: Did you, by any chance, have lunch
25 in the Court cafeteria this noon?

1 MR. TUCKER: No, sir, I didn't.

2 QUESTION: You know we have one here in the
3 building?

4 MR. TUCKER: Yes, sir.

5 QUESTION: If you prevail here, do you think
6 there would be a spill-over effect on the cafeteria here?

7 MR. TUCKER: No, sir. I don't. The --

8 QUESTION: Would you distinguish it on the
9 grounds that that's maintained chiefly for the
10 convenience of personnel working in the building?

11 MR. TUCKER: Yes, sir. I think that the
12 cafeteria here would be very similar to the situation
13 possibly in General Shale versus Struck Construction
14 Company.

15 QUESTION: But it is open to the general
16 public and is used by the general public.

17 MR. TUCKER: Yes, sir.

18 QUESTION: Did the Chief Justice say was
19 maintained chiefly or cheaply?

20 (Laughter.)

21 QUESTION: Well, my next question was going to
22 be what if, then, the evidence showed that 75 percent of
23 the customers were tourists and other people not
24 connected with this building, and only 25 percent were
25 people in the building?

1 MR. TUCKER: If that were the case, Your
2 Honor, and they were in direct competition, of course,
3 the difference here is federal versus state and local.
4 I think -- my understanding of the case is there's no
5 question but that the Congress has the power to regulate
6 through the commerce powers, activities of the state and
7 local governments. Whether or not --

8 QUESTION: Well, in the Chief Justice's
9 example, there's still the possibility that the
10 Robinson-Patman Act might not apply where there are
11 sales to a government entity which then itself engages
12 in activity that is competitive with private business.
13 But that it would cover just sales for resale by
14 government.

15 MR. TUCKER: Yes, sir. I think there is some
16 distinction in what is happening there in that there,
17 the hospital pharmacies are buying the drugs for the
18 purpose of intent of reselling --

19 QUESTION: They aren't just buying for the
20 purpose of running a hospital.

21 MR. TUCKER: No, sir.

22 QUESTION: Which -- the hospital would be
23 competitive, perhaps, but they nevertheless aren't --
24 here they're reselling.

25 MR. TUCKER: The hospital may be competitive

1 with other hospitals, and I think that from Justice
2 O'Connor's comment there has been some recognition that
3 some hospital activities, although it's not, according
4 to the case of Swain versus Milford City Hospital, Inc.,
5 it's not a traditional governmental function. Those
6 activities have been sanctioned to some extent.

7 But here you have something that is completely
8 outside the traditional function of government, and that
9 is the operation of retail pharmacies.

10 QUESTION: Would you concede that to the
11 extent that the state operated its public hospital and
12 its pharmacy within that hospital only for the benefit
13 of the indigent sick that the state undertook to care
14 for, that even under your test, the Robinson-Patman Act
15 would not apply?

16 MR. TUCKER: Your Honor, I think that would
17 depend entirely on the facts of the case. I think it
18 would depend on whether there was a resale in
19 competition, or whether or not, for instance, they were
20 giving away the drugs. I think --

21 QUESTION: Or sold very cheaply to people who
22 qualified as indigents who couldn't afford otherwise to
23 buy them.

24 MR. TUCKER: Well, I would have to say, Your
25 Honor, that if drugs were sold and they were sold in

1 competition with private enterprise and they were
2 obtained through discriminatory price bidding, then they
3 would have to fall within the proscriptions of the
4 Robinson-Patman Act. There are --

5 QUESTION: Wouldn't that have the effect of
6 discouraging states and local governments from providing
7 certain forms of assistance to the indigent sick?

8 MR. TUCKER: No, Your Honor, I don't believe
9 so. In Alabama this has not been a function of state
10 government. In fact, it's not even authorized by the
11 state code. The code -- nowhere have I been able to
12 find in the Code of Alabama, 1975 edition, anything that
13 authorizes any state agency, including hospitals, to
14 sell drugs to the general public. This is something
15 that has occurred and evolved through the development of
16 the University of Alabama in Birmingham which covers a .
17 60-square block area of downtown Birmingham.

18 I would like to point to the legislative
19 history. It appears, from the cases, that certainly, an
20 exemption should not be carved out. An exemption should
21 be just limited to the exemption stated. And there is
22 an exemption for private, non-profit hospitals. That
23 exemption, the Non-Profit Institution Act, in fact, does
24 cover governmental agencies.

25 But the legislative history supports our

1 position that purchases by state and county agencies are
2 covered by the Act when those agencies use those goods
3 in competition with private retail pharmacies, rather
4 than consuming them for their own use.

5 I'd point to Mr. Teegarden's testimony in the
6 petitioner's brief on the merits, pages 9 and 10, page
7 12, pages 15 and 16. There, Mr. Teegarden explained
8 that the state or federal government, whichever, is
9 saved by its function. That is, it was never envisioned
10 that the state or the federal government would be in
11 competition with private enterprise. That they would
12 take on this anti-competitive nature and compete with
13 private enterprise.

14 He stated that the reason they were not
15 subject to the Robinson-Patman Act, in his testimony,
16 was because they were not in competition. He went on to
17 say that if a city hospital competed with a
18 privately-owned hospital that it would be subjected to
19 the proscriptions of the Robinson-Patman Act. So
20 certainly, the legislative history of Mr. Teegarden when
21 he was testifying before the Senate or House committee,
22 covered this area. He covered this problem and stated
23 that if they enter into competition, then they are going
24 to be required to adhere to the proscriptions of the Act.

25 QUESTION: Your case only reaches situations

1 where the resale is available to the public generally, I
2 take it.

3 MR. TUCKER: That's correct.

4 QUESTION: So you don't think it would reach
5 post exchanges, which are just restricted to the
6 military.

7 MR. TUCKER: That's correct.

8 QUESTION: Or whoever they're restricted to.

9 MR. TUCKER: That's correct. So long as it is
10 restricted to that agency's own use, whether it was its
11 dependents -- I mean, employees or dependents of the
12 employees --

13 QUESTION: Well, what if the University of
14 Alabama said we'll only let students patronize the drug
15 store?

16 MR. TUCKER: They would only let students
17 patronize the drug store?

18 QUESTION: Yes.

19 MR. TUCKER: I don't think the students would
20 be covered.

21 QUESTION: Well, the students aren't covered,
22 but are the drug stores covered? You say it would not
23 apply if the federal government, or the government
24 agency restricted the resale to people within -- for
25 whom it had some responsibility.

1 MR. TUCKER: Yes, sir.

2 QUESTION: So I take it you've just excluded
3 the University of Alabama drug store if they say nobody
4 but students can buy here. Students or faculty.

5 QUESTION: Or faculty, yes. So you would
6 exclude them?

7 MR. TUCKER: Faculty and staff members could
8 purchase.

9 QUESTION: Yes. And the Robinson-Patman Act
10 wouldn't reach that situation.

11 MR. TUCKER: That's right.

12 QUESTION: And how about students?

13 QUESTION: In my understanding of students, it
14 would not apply, according to my reading of Abbott
15 Laboratories versus Portland Retail Druggists.

16 QUESTION: So then, the only competition
17 you're talking about is the extent to which the
18 university drug store sells to members of the general
19 public who are not either students or faculty.

20 MR. TUCKER: That's correct.

21 QUESTION: What about families of the faculty
22 or families of the students?

23 MR. TUCKER: They could purchase, also. My
24 reading of Abbot Laboratories versus Portland Retail
25 Druggists allows faculty members, staff and --

1 QUESTION: If that's the case, it's construing
2 an exemption from the Act. We don't have an exemption
3 here, do we?

4 MR. TUCKER: No, sir. There is no exemption
5 other than the Non-Profit Institutions Act. There is no
6 exemption spoken to in the entire Act.

7 QUESTION: Well, this is a very different
8 theory from Mr. Teegarden's theory that you quote I
9 think three times in your briefs. His theory was
10 there's an absence of injury to competition. Now you're
11 relying -- you say that isn't the test at all; the test
12 is 13c, which is a very different theory.

13 MR. TUCKER: Well, Your Honor, I would say
14 that Mr. Teegarden's theory is what I'm saying --

15 QUESTION: You see, his theory came before
16 there was any 13c.

17 MR. TUCKER: Right. There would be an
18 exemption; even though the Act applies there would be an
19 exemption to take it out from under the proscriptions of
20 the Act if it meets the test of Abbott Laboratories,
21 which considered 13c.

22 QUESTION: What is the legal basis for your
23 saying this? Just that it makes good sense? Because
24 you certainly can't base that on what Teegarden said;
25 you can't base it on 13c. It may make a lot of sense,

1 but is there any legal foundation?

2 MR. TUCKER: Yes, sir. As stated. The
3 Portlant Retail Druggist in my reading of it is the same
4 as what we have here except that we have governmental
5 institutions competing with private enterprise as
6 opposed to private persons.

7 If I may comment with regard to the Non-Profit
8 Institutions Act, that Act exempts purchases for
9 consumption by both non-profit and charitable
10 governmental institutions. My question would be why
11 would Congress, two years after the Robinson-Patman Act,
12 enact the Non-Profit Institutions Act if there was a per
13 se exemption already? It is only logical that the
14 Non-Profit Institutions Act was enacted to create this
15 exemption for non-profit charitable institutions and
16 governmental institutions.

17 And I would point to --

18 QUESTION: Is it possible that it was enacted
19 only to aid the charitable institutions? Wasn't that
20 where the problem was?

21 MR. TUCKER: Well, if I may point to the
22 legislative history of that, Justice O'Connor,
23 Representative Walter's testimony -- and that's found on
24 pages 8 and 9 of our Reply Brief, and on pages 11 and 12
25 of the Amicus Brief of the National Association of Retail

1 Druggists. Representative Walter's testimony there
2 specifically stated that the Non-Profit Institutions Act
3 applied both to charitable institutions and to
4 governmental agencies such as governmental hospitals.

5 Further, the case of Logan Lanes versus
6 Brunswick held that the sales of bowling equipment to
7 the Utah State University were exempt because that
8 bowling equipment and those bowling lanes were being
9 used for the university's own use, and it went into
10 detail to discuss how it was used in the PD program in
11 the teaching of classes, used by faculty members, used
12 in physical education by the students, et cetera.

13 Further, in the City of Lafayette case, as
14 found at 425 US, at page 397, footnote 14, this Court
15 exempted -- stated in that footnote that libraries were
16 exempt because they made purchases for their own use. .
17 Further, I would point to the motions to dismiss by nine
18 of the defendants in this case. Those motions are found
19 in the Joint Appendix Pages 19A to 48A. Nine of the
20 defendants in this case concede that the Non-Profit
21 Institutions Act applies to governmental purchasers.

22 Now, I would suggest that if the Non-Profit
23 Institutions Act applies to governmental purchases then,
24 of course, the Robinson-Patman Act would have to apply
25 to those purchases.

1 Further, the attorneys general of the states
2 of California and Georgia --

3 QUESTION: Let me interrupt a minute. They
4 filed a motion to dismiss and one of the grounds of the
5 motion was that the sales allegedly made are lawful
6 under 13c. Is that a concession, you think, that --

7 MR. TUCKER: I think so, Your Honor. Nine of
8 the defendants -- and in fact, one of those defendants
9 is Cooper Green Hospital. Cooper Green Hospital, in my
10 opinion, by filing this amendment, concedes that the Act
11 applies by claiming the exemption under 13c.

12 The attorneys general of California and
13 Georgia have held that the Robinson-Patman Act applies
14 to governmental bodies when they act in competition with
15 private enterprise. These opinions of the attorneys
16 general are referred to in our brief at page 13 and
17 pages 14 and 15 of the Amicus Brief of the National
18 Association of Retail Druggists.

19 In the case referred to by the Georgia
20 attorney general, the state was running a factory for
21 the blind, and in that opinion, the attorney general
22 found that the Robinson-Patman Act did not apply to
23 sales by that factory for the blind because they were --
24 the sales were made to state agencies. But he went on
25 to say that the factory for the blind would divest

1 itself of its sovereignty if it acted in a proprietary
2 interest. That is, if it sold goods out of that factory
3 to the general public, if it got outside of sales to
4 state agencies and to the state itself. Once it got
5 outside that sphere, then its sales would be subject to
6 the Robinson-Patman Act.

7 Further, I would point to the opinion of the
8 district court which is relied upon by the court of
9 appeals, and would say that the cases and other
10 authorities cited by the district court do not support
11 its ruling. Each and every of the cases cited as
12 authority by the district court did not consider the
13 issue of whether or not sales by governmental agencies
14 were being made to the general public in direct
15 competition. None of those cases and none of those
16 citations considered that point.

17 The case of General Shale versus Struck which
18 I've already mentioned was one of the cases relied upon
19 by Judge Pointer of the Northern District of Alabama, in
20 that case there was no sale of brick. Further, the
21 brick was used by the City of Louisville, Kentucky for
22 its own use in building a housing project. And thus,
23 since there was no sale and it was for their own use,
24 there was no competition.

25 Further, another case cited by the district

1 court, Gulf Oil versus Copp, turned on the fact that
2 there was no interstate commerce. So that case is
3 inapplicable. The case of Logan Lanes versus
4 Brunswick. That's a Ninth Circuit case that affirmed
5 the district court's dismissal of a plaintiff's case
6 against Brunswick on the basis that the Non-Profit
7 Institutions Act applied. Because the Non-Profit
8 Institutions Act applied and the state university was
9 using the bowling lanes were for their own use, again,
10 they were exempt because of that.

11 Further, the attorneys general's opinions
12 cited by the district court did not consider purchases
13 that were being made for the purpose of resale by state
14 and local agencies. They did not consider the factor of
15 competition with private enterprise. The opinions of
16 the -- I might add, too, that the opinion of the
17 Attorney General of the United States speaks to
18 purchases by federal government and not to state and
19 local agencies. And I think that's the key difference
20 there.

21 The opinions of the attorneys general of
22 Minnesota, Wisconsin and North Carolina were cited by
23 the district court, but again, in each of these
24 opinions, it was not considered -- there was no
25 consideration as to whether or not there was competition

1 with private enterprise.

2 I'd like to save a few minutes. Thank you.

3 QUESTION: May I ask you a question before you
4 sit down? Did I understand you to say at the outset
5 that the record does not show what percentage of the
6 sales by these pharmacies went to the public generally?

7 MR. TUCKER: No, sir, we did not get that far.

8 QUESTION: You don't have any record other
9 than the pleadings, do you?

10 MR. TUCKER: No record other than the
11 pleadings.

12 QUESTION: Decided on the motion to dismiss.

13 MR. TUCKER: That's correct, Your Honor.

14 CHIEF JUSTICE BURGER: Mr. Klingsberg.

15 ORAL ARGUMENT OF DAVID KLINGSBERG, ESQ.

16 ON BEHALF OF THE RESPONDENT

17 MR. KLINGSBERG: Mr. Chief Justice, and may it
18 please the Court:

19 This case presents the question of whether
20 sales to state and local government agencies are within
21 the coverage of the Robinson-Patman Act. I respectfully
22 suggest that the petitioner has drawn the issue too
23 narrowly, and that in interpreting congressional intent
24 as to whether the Robinson-Patman Act covered state and
25 local government agency purchases and looking at the

1 language of the Act, it can't simply be limited to
2 drugs, it can't simply be limited to hospitals and it
3 can't simply be limited to the state of Alabama.

4 But rather, it deals with the entire spectrum
5 of government agencies, a great many of which purchase
6 commodities and purchase commodities which are covered
7 by the Robinson-Patman Act if indeed the Act was
8 applicable, whether they're sold for use or for
9 consumption or resale under the terms of the Act.
10 herefore, a very far-reaching assertion is being made
11 here by the petitioner.

12 Our position, based on legislative history,
13 judicial decisions and the unanimous view of the
14 commentators, including Representative Patman, is that
15 Congress did not intend to apply the Robinson-Patman Act
16 to purchases by state and governmental agencies.

17 I would like, if I may, to concentrate on two
18 main points; one, the statutory scheme as reflected in
19 the Robinson-Patman Act of 1936 and the Non-Profit
20 Institutions Act of 1938, which we say is logical and
21 consistent only if the earlier statute, the original
22 Robinson-Patman Act, is read as the legislative history
23 indicates; not to reach purchases of governmental
24 agencies.

25 And this conclusion is buttressed by

1 Congress's rejection in 1951 and 1953 of specific
2 proposed amendments which were not enacted to extend the
3 statute's reach to purchases by states and their
4 political subdivisions. And thereafter, Congress failed
5 to act despite more than 40 years of uniform enforcement
6 agency recognition --

7 QUESTION: Do you have any instances in that
8 legislative history of where the committee reports or
9 individual congressmen or senators addressed expressly
10 the sales for resale matter? I know --

11 MR. KLINGSBERG: There was discussion --

12 QUESTION: I've read your briefs, but I didn't
13 notice you ever picked out a particular instance like
14 that.

15 MR. KLINGSBERG: Right. There was discussion
16 in the oral hearings with Mr. Teegarden, who is counsel
17 to the wholesalers and one of the draftsman --

18 QUESTION: That may have been in a hearing,
19 but nothing on the floor or in any committee reports.

20 MR. KLINGSBERG: Well, in the committee -- in
21 a written brief which Mr. Teegarden submitted, he was
22 asked the question: would the bill prevent competitive
23 bidding on government purchases below trade price
24 levels. And he answered that question first by saying
25 that as a matter of statutory construction he would

1 think that it would not be covered, and he assured
2 Congress that it wouldn't be covered. And then he said
3 a further reason was the effect on competition because
4 of the requirements relating to secondary line
5 competition.

6 I should point out, Your Honor, that the
7 Robinson-Patman Act as ultimately passed also has a
8 primary line provision in which there would be liability
9 where there is a sale to a state, for example, if indeed
10 the states were covered, and there is no effect on
11 competition by the state or the city or the municipality
12 with some drug store or retailer, but there was an
13 effect on competition at the primary line level between
14 the sellers.

15 And so on that basis, it would seem that the
16 resale or the competition are not, by the state, would
17 not, under the terms of the statute, have anything to do
18 with whether the Act applies or not. And Mr.
19 Teegarden's written report indicates the categorical
20 elimination of applicability and assurance to the
21 congressmen who were concerned as to whether or not the
22 states and municipalities could continue their practice
23 of competitive bidding and buy, in the words of
24 Congressman Hancock who asked one of the questions, at
25 the cheapest prices.

1 Congress was concerned that the states and
2 cities be able to purchase at the cheapest prices and
3 continue the practice, which they have today, of buying
4 at prices as the question asked in the written report
5 says, below trade price levels.

6 Now, --

7 QUESTION: Mr. Klingsberg, with respect to the
8 instances in 1951 and 1953 where you say that Congress
9 rejected efforts to amend the Act, were there bills that
10 actually were -- hearings were held on in committee?
11 Did they get out of committee?

12 MR. KLINGSBERG: Not in the 1951 and 53, but
13 in 1968 and 69, there were extensive hearings before a
14 subcommittee of Congress on small business which dealt
15 with this very problem. The whole controversy was
16 raised. And as a matter of fact, Mr. Kintner, who is
17 counsel to National Association of Retail Druggists who
18 is one of the principal amici here, told the congressman
19 on that occasion that there were three categories.

20 One category was government, and that was not
21 covered by the Robinson-Patman Act. The second category
22 was charitable eleemosynary institutions, and that
23 category was covered by the Robinson-Patman Act but
24 given a partial exemption under the Non-Profit
25 Institution Act. The Non-Profit Institution Act did not

1 apply to government.

2 And the congressional subcommittee adopted
3 that, quoted it in its report and -- to find the
4 Non-Profit Institution Act as only applying to private
5 charitable institutions, and concluded after extensive
6 hearings at which it was brought out that there's
7 competition between drug stores and hospital pharmacies
8 and so forth, there was testimony by pharmaceutical
9 manufacturers that went on for weeks -- concluded that
10 what should be done is the administrative agencies
11 should enforce the Robinson-Patman Act as against the
12 non-profit, non-governmental private charitable
13 hospitals where they don't meet the requirements of the
14 1938 Act.

15 But never concluded and was never even asked
16 by the National Association of Retail Druggists to
17 extend the basic Robinson-Patman Act to cover
18 governmental purchases. So Congress --

19 QUESTION: What was the purpose of that
20 committee report? Was it to say do not pass or do pass
21 with respect to a particular piece of legislation?

22 MR. KLINGSBERG: I think the purpose was to
23 consider the problem which was set before it at great
24 length and to make recommendations which was a
25 recommendation to the administrative agencies that they

1 should enforce the Act as against the private,
2 charitable hospitals.

3 Now, inherent in what I've been saying, if
4 Your Honors please, is that to appreciate the logic of
5 the statutory scheme, you have to look both at the 1936
6 Act and the 1938 amendment. My proposition is that the
7 1938 amendment did not exempt governmental bodies
8 because they were not covered by the Robinson-Patman Act
9 to begin with, and any other construction would be
10 illogical.

11 By its terms, the 1938 amendment provided for
12 exemption of non-profit institutions. Now, that's not a
13 term which is ordinarily applied to government. It's
14 not the term which Congress used in 1951 and 1953 when
15 they proposed amendments. The called the state the
16 states and political subdivision states political
17 subdivisions.

18 The Non-Profit Institutions Act applies to
19 purchases for own use by schools, colleges,
20 universities, public libraries, churches, hospitals and
21 charitable institutions, not operating for profit. Now,
22 charitable institutions and churches are plainly not
23 government.

24 Others, schools, libraries and hospitals
25 theoretically encompass both governmental and

1 non-government owned bodies. Schools can be private.
2 So can hospitals, and as to libraries, despite the
3 footnote in the Lafayette case which respectfully, we
4 say is wrong, libraries can, I was very interested to
5 find out, be privately run, privately endowed, open to
6 the public libraries. And there are thousands of
7 libraries like that in the United States.

8 Now, if governmental purchases were intended
9 to be covered by the 1938 exemption, a logical
10 legislature surely would have included other types of
11 governmental buyers. Why would you have just three
12 exemptions for libraries, schools and hospitals and
13 apply the Robinson-Patman Act without any exemption,
14 without any own-use exception to police, fire,
15 sanitation, transit, parks, the cafeteria downstairs,
16 museums, prisons and so on.

17 An irrational statutory scheme would result if
18 the Robinson-Patman Act of 1936 were interpreted to
19 reach purchases of all governmental entities and the 38
20 Act were interpreted just to exempt partially three
21 governmental entities. The only logical conclusion is
22 that Congress believed, as the legislative history
23 supports, that government purchases were not covered by
24 the original '36 Act, and the 1938 Act only applies to
25 non-governmental eleemosynary, not-for-profit schools,

1 hospitals, libraries, churches, --

2 QUESTION: Mr. Klingsberg, isn't it possible
3 that in 1938, Congress didn't particularly consider the
4 primary line competition problem because your principal
5 focus was on the secondary line I think, in the
6 Teegarden testimony at least, and that the assumption
7 that it didn't apply was simply based on the assumption
8 that you wouldn't have competitive injury in the normal
9 case where there are sales to the government.

10 MR. KLINGSBERG: Your Honor, I think there are
11 government agencies, in addition to the three that might
12 be governmental in that Act, which compete, would sell
13 for resale --

14 QUESTION: I understand it's conceivable, as
15 this case demonstrates. But what the -- the agencies
16 they talked about, the large purchase contracts and so,
17 forth, in the attorney general's opinion, were those
18 where there wouldn't be any realistic likelihood of
19 competitive injury at the secondary line.

20 MR. KLINGSBERG: Well, public transit competes
21 with private buses. Public sanitation competes with
22 private. Cafeterias compete with restaurants. Gift
23 shops and souvenir shops in museums compete. I think
24 there are many areas where there might be competition
25 which aren't mentioned in this 1938 Act.

1 QUESTION: That's my very point. The areas of
2 government purchases that are mentioned in the attorney
3 general's opinion and in the relevant discussion by
4 Teegarden and others are areas in which there would be
5 no competition with the private sector.

6 MR. KLINGSBERG: Why would they pick, for
7 example, libraries? Libraries are not a particularly --

8 QUESTION: That was in 38.

9 MR. KLINGSBERG: In the 38 Act. Why would
10 they pick libraries, which ordinarily would not be
11 viewed as competing or selling for resale? Why would
12 they pick schools or hospitals out of the myriad of
13 agencies? It seems to me the only logical conclusion is
14 that as Congress indicated in the Senate and the House
15 reports on the 1938 Act, that was dealing with
16 eleemosynary institutions. That's what Congress said in
17 both the Senate and the House reports. And eleemosynary
18 institutions are private, charitable institutions.
19 That's what Congress said again in 1968 when it
20 considered the matter.

21 And therefore, it would be very unreasonable
22 and unfair and illogical to have the basic
23 Robinson-Patman Act of 1936 applying to every government
24 agency and the 1938 Act exempting only three. And
25 that's the reason why the logical statutory scheme,

1 rational statutory scheme would be if the original
2 Robinson-Patman Act did not cover any governmental
3 agencies in the 38 Act; only exempted non-profit,
4 private, charitable, eleemosynary institutions.

5 QUESTION: What do you think is the strongest
6 case or opinion supporting your position?

7 MR. KLINGSBERG: If Your Honor please, I think
8 that there has to be a conglomeration of all of the
9 factors we have here. Mr. Teegarden's written
10 statement, Representative Patman in --

11 QUESTION: I understand the accumulation of
12 arguments. You don't think there's one case that you
13 can point to that really is quite persuasive, or one
14 opinion?

15 MR. KLINGSBERG: One --

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1 QUESTION: If you had to pick out the one
2 authority that you wanted to really rest on, would you
3 pick one?

4 MR. KLINGSBERG: I don't think I could pick
5 one more than the other, except perhaps Mr. Teagarden's
6 written statement.

7 QUESTION: But he emphasizes competition, is
8 the problem with that. He emphasizes the absence of
9 injury to competition.

10 MR. KLINGSBERG: He says that's a further
11 reason.

12 QUESTION: Yes.

13 MR. KLINGSBERG: But I think that really --

14 QUESTION: He doesn't categorically say that
15 no sale to government could ever be covered.

16 MR. KLINGSBERG: Well, he says that eliminates
17 the possibility, meaning there is no possibility, but I
18 prefer to take the conglomeration of facts.
19 Representative Patman in 1938, the same year that the
20 1938 Act was passed, said in his treatise that the
21 Robinson-Patman Act did not cover governmental
22 purchases.

23 And then, 15 years later, there was the
24 submission of the two bills which Congress failed to
25 enact which would have expressly extended.

1 QUESTION: Could I ask you --

2 MR. KLINGSBERG: Yes, Your Honor.

3 QUESTION: -- what you think the limits of the
4 exemption for sales to chuches and eleemosynary
5 institutions, do you think -- an exemption for purchases
6 that have -- and use that have some relation to their
7 function?

8 MR. KLINGSBERG: I think Your Honors defined
9 that in the Abbott case, in a very complicated way for
10 hospitals, and I suppose if that were, contrary to the
11 plain wording of the statute, extended to every single
12 governmental agency --

13 QUESTION: Well, I just want to talk about the
14 eleemosynary institution. Take a private -- take a
15 church. Take a church. It decides that to make a
16 little money we'll go into the book business. They
17 start buying books very cheaply and selling them very
18 cheaply.

19 MR. KLINGSBERG: They wouldn't be exempt.

20 QUESTION: Why not?

21 MR. KLINGSBERG: Because it wouldn't be for
22 own use.

23 QUESTION: Well, they are certainly using them
24 to make some money.

25 MR. KLINGSBERG: I think own use means --

1 QUESTION: So you think that that exemption
2 then is limited to own use, the '38 Act.

3 MR. KLINGSBERG: That's what the statute
4 says.

5 QUESTION: Yes, and you wouldn't include
6 within own use resales.

7 MR. KLINGSBERG: Not for profit.

8 QUESTION: But you think the exemption for
9 governmental institutions, which you say was
10 pre-existent --

11 MR. KLINGSBERG: Yes, Your Honor.

12 QUESTION: -- covers resales as well as
13 anything else.

14 MR. KLINGSBERG: I'd say it covers everything,
15 that it was never intended to be covered in the first
16 place. I said government was not intended to be --
17 purchases by government --

18 QUESTION: Yes, yes, but why do you -- but you
19 yet have to come up with some support in the legislative
20 history to indicate that the government exemption which
21 you say existed from the very start covers purchases for
22 resale as well as just purchases.

23 MR. KLINGSBERG: Yes. I say that because Mr.
24 Teagarden in his written brief gave two grounds, and the
25 first ground was a matter of statutory construction,

1 which has nothing to do with resale --

2 QUESTION: I know, but I still want you to
3 find me some express mention of purchases for resale
4 anywhere in the legislative history, where somebody
5 gives the opinion that the government may decide to go
6 into competition with private industry and purchase
7 goods for resale and direct competition, and that that
8 was exempt.

9 MR. KLINGSBERG: I can only --

10 QUESTION: Well, there isn't any, is there?

11 MR. KLINGSBERG: There is not any explicitly.

12 No, Your Honor. I can only infer --

13 QUESTION: Any more than there is for private
14 institutions.

15 MR. KLINGSBERG: In the original statute?

16 QUESTION: No, under the '38 Act.

17 MR. KLINGSBERG: That's explicit in the Act.

18 QUESTION: Are you speaking, strictly speaking
19 of an exemption in the same sense that the '38 Act
20 conferred an exemption on eleemosynary institutions, or
21 are you speaking simply of a failure to include within
22 the Act in the first place?

23 MR. KLINGSBERG: The latter, Your Honor.

24 QUESTION: Although it is pretty hard to say
25 that the literal words of the statute doesn't cover

1 sales to government. You have to imply some -- you have
2 to do -- you have to construe the Act not to include
3 government.

4 MR. KLINGSBERG: Yes, Your Honor. The Court
5 in the past --

6 QUESTION: But the words in plain black and
7 white --

8 MR. KLINGSBERG: The Court in the past has
9 said, for example, in regard to the Sherman Act where
10 there is no expression of intent one way or the other,
11 that that would apply to cities, for example, in the
12 Lafayette and Boulder case, but here we have a whole
13 host of indicia which the Court has traditionally
14 applied in terms of analyzing the purpose, context,
15 legislative history, post-enactment history, et cetera,
16 and --

17 QUESTION: Mr. Klingsberg, may I ask you a
18 question --

19 MR. KLINGSBERG: Yes.

20 QUESTION: -- just give you a chance to
21 comment on it? I don't know if it's totally relevant or
22 not, but among the amicus briefs, I don't find a brief
23 from the Solicitor General, and they have expressed
24 their views on the Robinson-Patman Act in several cases
25 recently, and generally have not been sympathetic to the

1 statute, and their client surely has a great interest in
2 the outcome of this case. How do you explain that?

3 MR. KLINGSBERG: I don't know if this is
4 proper argument, but I spoke to them -- I spoke to the
5 proper person in the Justice Department, and they said,
6 this is a question of pure statutory intent. We are
7 sure you can argue it as well as we can. There is no
8 economic issues.

9 QUESTION: Within context, when --

10 QUESTION: Not interested in the law?

11 QUESTION: If it was Mr. Patman who said it,
12 the statement that was mentioned that this was for
13 government purchases, is it not implicit in that kind of
14 a statement, fairly implicit government purchases for
15 its own use?

16 MR. KLINGSBERG: Your Honor, Representative
17 Patman stated in his book that the Attorney General of
18 the United States has ruled that the Act does not apply
19 to government, meaning federal government, and it may be
20 presumed that his reasoning may also be applied to
21 municipal and public institutions, so Representative
22 Patman said in 1938 that he, the sponsor of this bill,
23 the man whose name appears, did not think that it
24 applied at all to governmental purchases.

25 QUESTION: That is somewhat post-legislative

1 history, isn't it?

2 MR. KLINGSBERG: But it's the same time, Your
3 Honor, as the 1938 Act was proposed, and it doesn't seem
4 to make any sense to say that Congress in 1938 would
5 have had a partial exemption for just three kinds of
6 governmental entities and left the dozens of other
7 governmental entities subject to the Act without any
8 even own use exception, which would be a very
9 far-reaching kind of holding, and very unfair and
10 illogical to have in the one sense transit, parks,
11 recreation, et cetera, et cetera, all apply without any
12 exception at all, and to just pick these three, schools,
13 hospitals, and libraries, and say, well, those are the
14 only three to which we will give a partial exception.

15 It seems to me much more logical to say, as
16 Mr. Teagarden indicated in his written report, that the
17 Act didn't apply to -- the original Act didn't apply to
18 government at all, and the Court has said on many
19 occasions that post-enactment history can be persuasive
20 evidence, not conclusive, but persuasive.

21 Recently mentioned in the Northhaven case,
22 statutory construction has been fully brought to the
23 attention of Congress. I have showed how that
24 occurred. In the Gulf case, Gulf against Kopp, dealing
25 with the Robinson-Patman Act, how the failure of

1 Congress to act is significant. Here we not only have
2 the failure of Congress to Act, we have specific
3 legislation to extend coverage being proposed and that
4 not being accepted by the Congress.

5 The Court has said that the positions of
6 administrative agencies and enforcement agencies has
7 great weight. There has never been a case on record
8 where the Department of Justice or the FTC, charged with
9 the administration of this Act, have ever applied it or
10 filed a claim against anyone selling to or any state or
11 governmental agency purchasing.

12 There have been 46 years of uniform thought
13 among commentators, all the leading commentators, Roven,
14 Kolinowsky, Mr. Kintner, the counsel to the National
15 Association of Retail Druggists, all believing and
16 operating on the premise that the Robinson-Patman Act.
17 does not apply to governmental purchases, and we think
18 under these circumstances, where the Act has been
19 universally and long recognized as not applying, that
20 any change --

21 QUESTION: May I ask you one other question
22 that I have thought of and that is not discussed in the
23 brief? What about the Idaho -- North Dakota, I guess it
24 is, has the cement plant, Reeves against State. When
25 the government operates as a market participant and

1 therefore avoids some of the constitutional problems
2 that it might otherwise have, would it still not be
3 subject to the Robinson-Patman Act in your view?

4 MR. KLINGSBERG: Yes, Your Honor, and as a
5 matter of fact, this very point was brought to the
6 attention of Congress at great length in the 1968
7 hearings. There was testimony by numerous
8 representatives of the drug industry. A year later
9 there was testimony by wholesalers, but automotive
10 industry people, all saying that the Robinson-Patman Act
11 does not apply to governmental purchases, and that there
12 are a lot of instances in a variety of industries where
13 government competes, and Congress's only reaction to
14 that was to -- the Subcommittee's reaction was to render
15 a report saying, well, it can be enforced against
16 private charitable, eleemosynary institutions if they
17 don't comply with the '38 exemption, but didn't say
18 anything about applying the Act to governmental
19 purchases where they compete.

20 It's a situation where, to take the words of
21 prior Court opinions, there has been public
22 controversy. The controversy has been brought to the
23 attention of the Congress, and Congress has not acted,
24 and that is persuasive evidence, in light of all the
25 facts that we have, under traditional criteria applied

1 by the Court, that the Act was not intended to apply in
2 the first place.

3 And taking all that into account, and
4 combining it with the statement by Mr. Teagarden that as
5 a matter of statutory construction Congress can be
6 assured that the Act will not apply to governmental
7 purchases, and that these government bodies can
8 continue, as the Congressman expressed concern about, to
9 have competitive bidding and to purchase at cheapest
10 prices. That's what Congress was concerned about. Mr.
11 Teagarden said, don't worry about it. If you leave out
12 the government, then they are not covered, and the issue
13 is not whether this was correct statutory interpretation
14 or not, as the Court recently pointed out in the Merrill
15 Lynch and the Brown case. The question is, how did
16 Congress perceive this, not whether or not the statutory
17 construction was correct, although I think that there is
18 support which we cite and discuss in our brief for the
19 point that this statutory construction is correct.

20 I should point out also that in -- there have
21 been -- in two of the cases, one the Saks case, that
22 dealt with sales to government liquor stores, and the
23 General Shale case dealt with construction, these are
24 both situations where the government did not compete,
25 and this was an alternative ground of holding, but one

1 ground of holding was that the Robinson-Patman Act did
2 not mean to cover government sales in the first place.

3 I would like to also point out in answer to
4 the question which was asked earlier of the Petitioner
5 that hospitals doing the dispensing of pharmaceuticals
6 and the giving of public health care is a traditional
7 governmental function. The district court here so
8 found, and the Court in National League of Cities so
9 held.

10 There are just two brief points that I want to
11 make quickly that are discussed in the brief. One is
12 that the state has argued in its brief, and I am going
13 to mention the point, that in order to avoid significant
14 questions under the Tenth Amendment, that the Court
15 should construe the statute so as not to apply to
16 governmental purchases.

17 The other is that in view of the almost
18 universally recognized inapplicability of the statute to
19 governmental purchases for 46 years, if the Court
20 should, and I don't think there is basis, but if the
21 Court should decide this issue of first impression, then
22 there should not be a retroactive application which
23 would upset not only the states' allocations, cost
24 computations, how they determine what programs to have,
25 what prices are going to be charged, but also have a lot

1 of treble damage liability in cases both against states
2 and against the -- sorry, strike states, buffer against
3 the manufacturers of drugs in this particular case, but
4 the manufacturers of every single product, every single
5 commodity which are sold to state and governmental
6 agencies.

7 And I emphasize again in conclusion that this
8 is not a case which is limited to drugs or hospitals.
9 This is a very, very far-reaching case which would go to
10 the very heart of everything that states buy, and all
11 the cost allocations which states have made, all the
12 programs which they have in place which are based upon
13 the prices which they have been able to get at lower
14 than trade levels because of the inapplicability of the
15 Robinson-Patman Act.

16 QUESTION: May I just put one extreme example?

17 MR. KLINGSBERG: Yes.

18 QUESTION: Assume that the post exchanges that
19 are now all over the world where there are government
20 forces stationed were proving to be modestly profitable,
21 and the government decided to go into the supermarket
22 business, calling them post exchanges, and opened them
23 in competition with the chains of food supermarket
24 stores around the United States, so that you had a
25 Safeway and a Giant and a government PX, all open to the

1 public. That still, under your analysis, I suppose,
2 would be exempt?

3 MR. KLINGSBERG: Yes, Your Honor. As a matter
4 of fact, that's a very hot issue. It has been in the
5 press. It is the basis on which bills were offered to
6 Congress to have the Robinson-Patman Act coverage extend
7 to the federal government. These post exchanges do not
8 merely sell to military, they sell to diplomats and a
9 whole host of other people. That is a matter for
10 Congress.

11 QUESTION: They do not sell to retired reserve
12 officers. I know that.

13 (General laughter.)

14 MR. KLINGSBERG: But that's the kind of issue
15 which, like the sales to the states and political
16 subdivisions, we suggest, involves so many far-reaching
17 political and economic issues that that should be
18 considered by Congress and has been considered by
19 Congress, and not after 46 years of inapplicability be
20 taken up and altered by the Court at the present time.

21 Thank you.

22 CHIEF JUSTICE BURGER: Do you have anything
23 further, Mr. Tucker?

24 ORAL ARGUMENT OF JOE L. TUCKER, JR., ESQ.,

25 ON BEHALF OF THE PETITIONER - REBUTTAL

1 MR. TUCKER: Yes, Your Honor.

2 Mr. Klingsberg states categorically that the
3 Non-Profit Institutions Act does not apply to government
4 institutions. I would point the Court to Page 34-A and
5 Page 35-A of the Joint Appendix in this case, in which
6 Mr. Klingsberg's name appears of counsel. His law
7 firm's name appears of counsel on behalf of Charles
8 Pfizer and Company, and in his motion to dismiss before
9 the district court, Paragraph Number 5 states, sales of
10 goods -- states as a ground for dismissing the case,
11 sales of goods alleged to have been made at
12 discriminatory prices that were lawful under 15 UCS
13 Section 13(c).

14 Why, then, if it does not apply, did they
15 plead it in this case?

16 QUESTION: Do you think we are bound by that? .

17 MR. TUCKER: Sir?

18 QUESTION: Are we bound by that?

19 MR. TUCKER: No, sir, but I think that --

20 QUESTION: Do you think he is bound by it?

21 MR. TUCKER: I think --

22 QUESTION: Could he withdraw that motion if he
23 wanted to?

24 MR. TUCKER: I think at this point that it at
25 least serves as an admission that --

1 QUESTION: Well, it is not a binding admission.

2 MR. TUCKER: -- they thought it applied at
3 that time.

4 QUESTION: Whoever drafted that motion thought
5 it applied when he filed that motion.

6 MR. TUCKER: Yes, sir. I would also point to
7 the -- to Page 8 and 9 of our reply brief, that tracks
8 the legislative history, the testimony by Mr. Walter,
9 who was the sponsor of the Non-Profit Institutions Act,
10 and Mr. Saddle asked him, "Does the gentleman think a
11 county hospital or a city sanitarium wholly financed by
12 a city, county, or state would come within the
13 provisions of this Act," meaning the Non-Profit
14 Institutions Act. Mr. Walter responded, "Yes, I do."
15 Mr. Walter was a sponsor of that Act.

16 Further, Mr. -- as Justice Powell -- Justice
17 Stevens mentioned, Mr. Teagarden did not categorically
18 state that the government was exempt from the
19 Robinson-Patman Act. He qualified it. The question
20 was, the federal government is not in -- The statement
21 was by Mr. Teagarden, the federal government is not in
22 competition with other buyers from these concerns. The
23 federal government is saved by the same distinction, not
24 of location, but of function. They are not in
25 competition with anyone else who would buy. That is

1 what Mr. Teagarden says with regard to that provision.

2 Also, I would like to mention very briefly Mr.
3 Klingsberg's reference to the failure of Congress to act
4 on six subsequent proposed amendments. Those first two
5 proposed amendments in 1951 and '53 were proposed for
6 the purpose of restricting federal, state, and local
7 governmental purchases generally and arguably would have
8 extended to purchases by the government for their own
9 use.

10 The last four bills which were proposed by Mr.
11 Keogh did not even speak to state and local
12 governments. It went directly to federal agencies
13 alone, and certainly that can't be given any credence
14 toward this case when those last four bills did not
15 speak to state and local governments whatsoever, but
16 were limited to federal concerns.

17 QUESTION: Well, your argument would require
18 us to say that the states and federal government were
19 subject to the Act even on purchases for their own use,
20 wouldn't it?

21 MR. TUCKER: No, sir. No, sir.

22 QUESTION: Well, because the '38 Act just
23 doesn't cover the government, that one that exempted the
24 eleemosynary institutions.

25 MR. TUCKER: Well, the legislative history

1 seems to believe that it -- seems to say that it does
2 cover governmental agencies. Mr. Walter stated in his
3 testimony before the Committee hearing that, yes, it
4 does cover governmental hospitals.

5 QUESTION: Do you think the language of the
6 '38 Act lends itself to that construction?

7 MR. TUCKER: Sir?

8 QUESTION: Do you think the language of the
9 '38 Act lends itself to that construction, that it
10 includes the government as an eleemosynary institution?

11 MR. TUCKER: In those areas, yes, sir,
12 government hospitals, in the instances referred to by
13 Justice O'Connor for health care, for the indigent, it
14 would be covered and they would be exempt under the
15 Non-Profit Institutions Act for that purpose, but I am
16 not by any means trying to say that it should be applied
17 to government institutions where they are purchasing for
18 their own use. That is certainly exempt.

19 CHIEF JUSTICE BURGER: Thank you, gentlemen.

20 MR. TUCKER: Thank you.

21 CHIEF JUSTICE BURGER: The case is submitted.

22 (Whereupon, at 3:00 o'clock p.m., the case in
23 the above-entitled matter was submitted.)

24

25

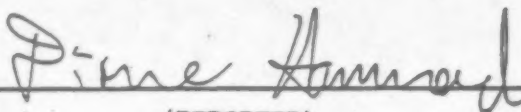
CERTIFICATION

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JEFFERSON COUNTY PHARMACEUTICAL ASSOCIATION, INC., v. ABBOTT LABORATORIES ET AL
91-827

and that these attached pages constitute the original transcript of the proceedings for the records of the court.

BY



(REPORTER)

IN THE
Supreme Court of the United States
OCTOBER TERM, 1981

JEFFERSON COUNTY PHARMACEUTICAL
ASSOCIATION, INC.,

Petitioner,

vs.

ABBOTT LABORATORIES, a corporation, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

AMICUS CURIAE BRIEF OF THE
NATIONAL ASSOCIATION OF RETAIL DRUGGISTS

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1981

No. 81-827

JEFFERSON COUNTY PHARMACEUTICAL
ASSOCIATION, INC.,

Petitioner,

vs.

ABBOTT LABORATORIES, a corporation, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

AMICUS CURIAE BRIEF OF THE
NATIONAL ASSOCIATION OF RETAIL DRUGGISTS

All parties have consented to the filing of this Brief for *amicus curiae* in support of Petitioner, pursuant to Rule 36.2 of the Court.¹

INTEREST OF AMICUS CURIAE

Founded in 1898, the National Association of Retail Druggists (NARD) is a private, non-profit, voluntary organization composed of approximately 20,000 independent retail pharmacists, who own approximately 30,000 independent retail

¹See letter to Mr. Stevas from counsel to NARD with attachments (April 22, 1982).

pharmacies. NARD is the only national association which represents exclusively the interests of independent retail druggists. NARD has members in all fifty states, the District of Columbia, Puerto Rico, and the Virgin Islands. It is estimated that NARD members serve 18 million consumers daily. Independent retail pharmacists fill approximately 70% of the prescriptions filled at retail in the United States.

Members of NARD compete with each other, with chain drug stores, and with hospital pharmacies, many of which are operated by agencies or subdivisions of states, in the sale at retail of prescription and non-prescription drugs. The decision by the Court of Appeals exempting state-owned hospitals from the strictures of the Robinson-Patman Act adversely affects NARD members because it gives state-owned hospitals, with which NARD members increasingly find themselves in competition,² a favored competitive position due to the hospitals' ability to obtain pharmaceuticals at lower cost than can members of NARD. As a result NARD members have lost, and will continue to lose, retail sales, profits, and competitive position in the retail prescription and non-prescription drug markets. Thus the applicability of the antitrust laws to purchases of pharmaceuticals for resale by state-owned or affiliated hospitals is of vital interest to retail pharmacists, and the decision of the Eleventh Circuit that such purchases are beyond the reach of the Robinson-Patman Price Discrimination Act has a direct and significant impact on NARD members.

SUMMARY OF ARGUMENT

Six years ago, in *Abbott Laboratories v. Portland Retail Druggists Association*, 425 U.S. 1 (1976), this Court held that

²In 1979, state and local government hospitals made pharmaceutical purchases in excess of \$400 million, representing 4% of the market. Information as to the extent such purchases were made for resale is unavailable. PMA, *U.S. Pharmaceutical Industry 1979-1980 Annual Survey Report* 11.

drug purchases by nonprofit hospitals are exempt from the Robinson-Patman Price Discrimination Act only where made for the hospitals' "own use," pursuant to the specific exemption provided by the Nonprofit Institutions Act, 15 U.S.C. § 13c. The District Court³ in this case carried out a separate and broader implied exemption for purchases by hospitals which are owned by agencies or subdivisions of states. In granting defendants' motions to dismiss, the District Court, while accepting as true the allegations in the Complaint that local retail pharmacies had been injured by the challenged price discrimination, held that such price discrimination did not violate the Robinson-Patman Act, on the ground that there is an implied exemption for purchases by state hospitals, even where the hospitals are not the ultimate consumers but resell the purchased goods in competition with private enterprises. Thus the question in this case is whether sales to and purchases by state hospitals⁴ of goods for resale in the market place in competition with private business enterprises are exempt from the proscriptions of the Robinson-Patman Act.

The District Court's decision to imply a governmental exemption into the Robinson-Patman Act directly contradicts this Court's often-expressed presumption against implicit exemptions to the antitrust laws.⁵ The District Court's decision also

³The District Court judgment was "[affirmed] on the basis of the district court's Memorandum of Opinion" by the Fifth Circuit and appeared as an appendix to the Court of Appeals decision. *Jefferson County Pharmaceutical Ass'n v. Abbott Laboratories*, 656 F.2d 92, 93 (5th Cir. 1981). All references herein to the "District Court" refer to that Memorandum of Opinion.

⁴Except where otherwise noted, all references to state hospitals include those owned or operated by agencies or subdivisions of the state or by other local governmental entities.

⁵See *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 787 (1975); *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 350-51 (1963).

contradicts the decisions of this Court in *City of Lafayette*,⁶ *City of Boulder*,⁷ and prior cases that state and local agencies are not immune from the antitrust laws. The District Court's opinion would allow state agencies to enter freely all fields of commercial endeavor, immune from the reach of laws "as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms."⁸

The District Court made its decision despite the fact that on its face the Robinson-Patman Act, like other antitrust laws, reaches conduct by states and their subdivisions. The legislative history of the Robinson-Patman Act confirms that Congress intended that purchases by state or local governmental entities fall within the Act when those entities act in competition with other purchasers. Two years later, in the Nonprofit Institutions Act, Congress determined to exempt from the Robinson-Patman Act purchases made by nonprofit institutions "for their own use," recognizing that without this exemption such purchases, and therefore such institutions, were not exempt. The legislative history of that amendment makes clear that Congress intended this exemption to apply to governmental as well as private nonprofit hospitals. Thus purchases by state hospitals are exempt from the Robinson-Patman Act, when, and only when, they are made for consumption rather than resale.

The District Court opinion cited district court decisions, attorney general opinions, and treatises to support its holding. These authorities are inapplicable. They involve purchases by the federal government, or by a governmental entity for its own

⁶*City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978).

⁷*Community Communications Co. v. City of Boulder*, 102 S. Ct. 835 (1982).

⁸*United States v. Topco Assocs.*, 405 U.S. 596, 610 (1972).

consumption (which are exempt under the Nonprofit Institutions Act), and do not reach the issue of purchases by a governmental entity for resale in competition with private enterprises. Moreover, the District Court was apparently unaware of certain judicial decisions, and discounted certain attorney general opinions, that were contrary to its position.

Finally, application of the Robinson-Patman Act to state purchases for resale raises no substantial Tenth Amendment problems. *Hodel v. Virginia Surface Mining & Reclamation Association*⁹ held that to establish a Tenth Amendment violation a three-prong test must be met: the challenged statute must regulate the "States as States"; it must address matters that are "indisputably 'attributes of state sovereignty' "; and the states' compliance with federal law must directly impair their ability to "structure integral operations in areas of traditional functions." The purchase of drugs for resale is a proprietary activity which does not give rise to a Tenth Amendment defense against application of the Robinson-Patman Act.

Wherefore, *amicus curiae* NARD respectfully urges this Court to reverse the judgment below and hold that purchases of drugs by state hospitals are exempt from the Robinson-Patman Act only to the extent they are made for the hospitals' own use.

⁹101 S. Ct. 2352 (1981) (citations omitted).

ARGUMENT

I. PURCHASES FOR RESALE BY DEFENDANT STATE HOSPITAL PHARMACIES FALL UNDER THE ROBINSON-PATMAN ACT.**A. The Robinson-Patman Act, By Its Terms, Applies to All Persons, Including State And Local Governments.**

The antitrust laws apply to anticompetitive conduct of state and local governments, particularly with respect to their proprietary enterprises.¹⁰ As the District Court recognized, the terms "persons" and "purchasers" in the Robinson-Patman Act are "sufficiently broad to cover governmental bodies." 656 F.2d at 99. This Court has held that the word "person," as used in the Clayton Act¹¹ and the Sherman Act,¹² includes states and their political subdivisions. *City of Lafayette*, 435 U.S. at 394-97

¹⁰See *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 418-26 & 422 n.3 (1978) (Burger, C.J., concurring). See generally M. Wells & W. Hellerstein, *The Governmental-Proprietary Distinction in Constitutional Law*, 66 Va. L. Rev. 1073 (1980).

¹¹The Robinson-Patman Act's amendment of § 2(c) of the Clayton Act, 15 U.S.C. § 13(c), which prohibits "any person" acting for a purchaser from receiving any brokerage fee from the seller, applies to state governmental procurement officers acting within the scope of their job. *Rangen, Inc. v. Sterling Nelson & Sons*, 351 F.2d 851, 858-59 (9th Cir. 1965); cited with approval in *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 513 (1972). It makes no sense to interpret the word "person" any differently in § 2(c) than in §§ 2(a) or (f).

¹²This Court has found the Sherman Act applicable to states but not to the United States. Compare *United States v. Cooper Corp.*, 312 U.S. 600 (1941) (United States not "person" within meaning of § 7 of Sherman Act) with *Georgia v. Evans*, 316 U.S. 159 (1942) (state is person within meaning of § 7 of Sherman Act); see *Sea-Land Serv., Inc. v. Alaska R.R.*, 659 F.2d 243 (D.C. Cir. 1981).

(plurality opinion);¹³ *City of Boulder*, 102 S. Ct. at 842. Thus the clear language of the statute and this Court's prior decisions are sufficient to show that purchases by state and local government hospitals are within the reach of the Robinson-Patman Act.

B. The Legislative History Of The Robinson-Patman Act Demonstrates That The Act Is Intended To Cover Purchases By A State To The Extent The State Acts As Competitor Rather Than Consumer.

If one goes beyond the statutory language, one finds that the legislative history of the Robinson-Patman Act clearly demonstrates that no implied blanket immunity to purchases by state and local governmental entities was intended by Congress. Rather than suggesting an implied exemption, the debate prior to passage makes it abundantly clear that Congress intended the Act to apply to purchases by a state when the state was acting in competition with another purchaser.

This is demonstrated in the questioning of H.B. Teegarden, author of the Act.¹⁴ Responding to Representative Lloyd's questions concerning discounts to the federal government, Mr. Teegarden explained that the intent of the bill was to bar price

¹³The District Court's attempt to distinguish this case from *City of Lafayette* on the basis of the different reach of the Robinson-Patman and Sherman Acts, 656 F.2d at 99-100, is clearly erroneous. The only difference in reach between the two laws is the extent to which the activities complained of must affect interstate commerce. Congress' decision in the Robinson-Patman Act not to cover all transactions within its reach under the Commerce Clause, *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 199-201 (1974), does not mean that Congress chose not to cover the same range of "persons" whose conduct "in commerce" is otherwise subject to the Act.

¹⁴*Hearings on Bills to Amend the Clayton Act, Before the House Judiciary Committee, 74th Cong., 1st Sess. 9 (1935) (statement of Rep. Patman) [hereinafter cited as Hearings].*

discrimination to retailers selling in competition with each other and that, accordingly, the bill would not bar discounts to the federal government because the federal government is not in competition with other purchasers:

Mr. LLOYD. Would this bill, in your judgment, prevent the granting of discounts to the United States Government?

* * * *

Mr. TEEGARDEN. I do not see why it should, unless a discount contrary to the present bill would be barred — that is, the present law — would be barred by that bill.

Aside from that, my answer would be this: The Federal Government is not in competition with other buyers from these concerns. Therefore a discrimination — it is so applied universally in interstate commerce law, in the railroad law — to have a discrimination, there must be a relative position between the parties to the discrimination which constitutes an injury to one as against the other. I think the answer is to be found in that.

In other words, if seller A makes a price to a retailer in New York and a different price to a retailer in San Francisco, all other things aside, no case of discrimination could be predicated there, because the two are not in the same sphere at all.

The Federal government is saved by the same distinction, not of location but of function. They are not in competition with any one else who would buy.¹⁵

Immediately thereafter, Representative Hancock, using city hospital purchases as an example, asked whether the bill would eliminate competitive bidding by states or cities. Mr. Teegarden

¹⁵*Hearings, supra* note 14, at 208-09 (emphasis supplied).

answered that purchases by a municipal hospital would indeed be covered by the bill when the purchasing hospital was in competition with another hospital:

Mr. HANCOCK. It would eliminate competitive bidding all along the line, would it not, in classes of goods that would be covered by this bill?

Mr. TEEGARDEN. You mean competitive bidding on Government orders?

Mr. HANCOCK. Government, State, city, municipality.

Mr. TEEGARDEN. No; I think not.

* * * *

Mr. HANCOCK. Would they or could they sell to a city hospital any cheaper than they would to a privately-owned hospital, under this bill?

Mr. TEEGARDEN. *I would have to answer it in this way. In the final analysis, it would depend upon numerous questions of fact in a particular case. If the two hospitals are in competition with each other, I should say then that the fact that one is operated by the city does not save it from the bill. If they are not in competition with each other, then they are in a different sphere.*¹⁶

In essence, the author of the Act explained that (a) purchases by the federal government are not affected at least when the federal government is not in competition with other buyers; and (b) purchases by state or municipal institutions are within the scope of the Act when the institutions compete with other purchasers.

The District Court totally misunderstood Mr. Teegarden's explanation when it stated that the bill "would not require bidding

¹⁶Hearings, *supra* note 14, at 209 (emphasis supplied).

to cities and counties on the same basis as to private purchasers and . . . would not prevent competitive bidding on governmental purchases below trade price levels." 656 F.2d at 100 (footnote omitted). Indeed, as the District Court's own opinion recognized, Mr. Teegarden's answers "could be understood as premised upon the fact that governmental purchases would not typically have a potential effect upon competition." 656 F.2d at 100 n. 8. Mr. Teegarden in fact emphasized that purchases by a governmental entity *would* be covered where the governmental entity is in competition with private purchasers. The transactions at issue in this case involve just such competition with private enterprises.

The District Court rejected this obvious reading of Mr. Teegarden's testimony because of Mr. Teegarden's "reliance on principles of statutory construction." *Id.* Mr. Teegarden's reference, however, contained in a subsequent letter to the Committee,¹⁷ concerned only his earlier testimony discussing purchases by the *federal* government. The cited principle of statutory construction — "that a statute will not be construed to limit or restrict in any way the rights, prerogatives, or privileges of the sovereign unless it so expressly provides" — is inapplicable when the issue is the application of a *federal* statute to a *state* government.¹⁸ Thus his letter provides no basis for concluding that Mr. Teegarden meant anything other than what he so plainly said — that state hospitals purchasing for resale in

¹⁷*Hearings, supra* note 14, at 250.

¹⁸*Hearings, supra* note 14, at 250. Mr. Teegarden cited two Supreme Court cases, *Dollar Savings Bank v. United States*, 86 U.S. (19 Wall.) 227, 239 (1874), and *United States v. Herron*, 87 U.S. (20 Wall.) 251, 255 (1874) (statute does not restrict "sovereign authority of the country" unless sovereign specifically named). Those cases may support an argument that purchases by the United States, the *enacting* sovereign, are exempt from the Robinson-Patman Act, but support no such argument with respect to purchases by state or local governmental entities. See the cases cited in note 12, *supra*.

competition with private hospitals are covered by the Robinson-Patman Act.

C. The Nonprofit Institutions Act Exempts Purchases For "Own Use" By Both Charitable and Governmental Institutions.

The legislative history of the Nonprofit Institutions Act, 15 U.S.C. § 13c, further demonstrates that Congress understood the Robinson-Patman Act to reach purchases by state institutions. Passed two years after the Robinson-Patman Act, section 13c exempted from the scope of the Robinson-Patman Act "purchases of their supplies for their own use by schools, colleges, universities, public libraries, churches, hospitals, and charitable institutions not operated for profit." The legislative history clearly shows that section 13c was intended to protect government institutions, but only to the extent they purchased supplies for their own use.¹⁹ Congress' determination to exempt this category of state purchases underscores the fact that this category was previously covered by the Act and that other categories continue to be covered.

The floor debate on H.R. 8148, which subsequently became the Nonprofit Institutions Act, establishes conclusively Congress' intention that the Nonprofit Institutions Act apply to state and local governmental institutions and therefore that the Robinson-Patman Act apply to them except as specifically exempted by the Nonprofit Institutions Act. The sponsor of H.R. 8148, Representative Walter, stated that the bill covered, *inter alia*, institutions maintained, controlled, or financed by municipalities, cities, counties, or states, including "a county hospital."

Mr. SABATH: Mr. Speaker, reserving the right to object, may I inquire of the gentleman whether this

¹⁹The District Court's apparent lack of awareness of this critical legislative history, 656 F.2d at 102, may help to explain its misreading of the Act.

bill will also apply to institutions that are maintained and controlled by municipalities and cities? Many of the institutions that are financed by municipalities and by States might come also under its provisions?

Mr. WALTER. The bill clearly covers that class of institution. All charitable institutions are covered by the provisions of this bill.

Mr. SABATH: Does the gentleman think a county hospital or a city sanitarium wholly financed by a city, county or State, would come within the provisions of this act?

Mr. WALTER. Yes, I do.²⁰

Nothing could be clearer. The Nonprofit Institutions Act was written to provide, for governmental and private nonprofit hospitals alike, an exemption for "purchases of their supplies for their own use." This exemption was written to codify the intention of drafters of the Robinson-Patman Act.²¹ Purchases by all nonprofit hospitals, governmental and private, fit within this exemption — but only so long as they are for the hospital's "own use."²²

²⁰81 Cong. Rec. 8706 (Aug. 11, 1937).

²¹See 81 Cong. Rec. 8705 (Aug. 11, 1937).

²²As noted in *City of Lafayette*, 435 U.S. at 397 n.14 (plurality opinion), Congress included within the Nonprofit Institutions Act "public libraries" which "are, by definition, operated by local government." Other courts have applied the Nonprofit Institutions Act to governmental entities. *Burge v. Bryant Pub. School Dist.*, 520 F. Supp. 328 (E.D. Ark. 1980), *aff'd on other grounds*, 658 F. 2d 611 (8th Cir. 1981) (nonprofit, tax-supported school system was covered under Nonprofit Institutions Act); *Logan Lanes, Inc. v. Brunswick Corp.*, 378 F.2d 212, 215-16 (9th Cir.), *cert. denied*, 389 U.S. 898 (1967) (purchases by Utah State University within scope of Nonprofit Institutions Act). Indeed, many of the defendants in this action appear to agree that purchases by defendant hospitals fit within the Nonprofit Institutions Act. See the motions to dismiss filed by American Cyanamid Co. (para. 2); American Home Products Corp. (para. 7);

In sum, two years after enacting the Robinson-Patman Act Congress found it necessary to exempt from that Act purchases made by state and local governmental institutions for their own consumption. It thus recognized that without this exemption — one limited to purchases “of their supplies for their own use” — institutions owned by state and local governments would not be exempt. Congress could have easily provided a blanket exemption, merely by omitting the words of limitation “of their supplies for their own use.” It elected not to do so.²³

Portland Retail Druggists holds that the Nonprofit Institutions Act exempts from the Robinson-Patman Act only drug purchases made by a nonprofit hospital for its “own use” — i.e., use that “promotes the hospital’s intended institutional operation in the care of persons who are its patients.” 425 U.S. at 14. This Court found certain purchases non-exempt, including purchases for dispensation to former patients as prescription refills, purchases for sale to nondependents of hospital employees, students, or physician staff, and purchases to walk-in customers with no present connection with the hospital. Since hospitals owned by states or state subdivisions are covered by the Non-profit Institutions Act but are not otherwise exempt from the Robinson-Patman Act, the rules set forth in *Portland Retail*

Ciba-Geigy Corp. (para. 5); Pfizer Inc. (para. 5); G.D. Searle & Co. (para. 6); E.R. Squibb & Sons, Inc. (para. 5); Travenol Laboratories, Inc. (para. 6); and Upjohn Co. (para. 5).

²³While this example of congressional action after passage of the Robinson-Patman Act in 1936 confirms the Act’s application to governmental purchases for resale, the post-1936 examples of congressional inaction cited by the District Court, 656 F.2d at 101, suggest nothing to the contrary, if they suggest anything at all. With no hearings or debate it is simply impossible to know why Congress failed to act.

Druggists must apply to purchases made by the hospital defendants in this case.²⁴

D . The Attorneys General Of California And Georgia Have Held That The Robinson-Patman Act Applies To Governmental Bodies When Acting In Competition With Private Enterprises.

In a 1937 opinion, the Attorney General of California²⁵ concluded that the Robinson-Patman Act applies to all government contracts that produce the anticompetitive effect required by section 2(a) of the Robinson-Patman Act. Finding that governmental bodies are not *per se* exempt from the proscriptions of the antitrust laws, the Attorney General held that the Robinson-Patman Act, if otherwise applicable, "would not be held inapplicable . . . merely because the acts constituting the violation occurred in connection with a government contract, federal, state or municipal."

And a 1949 opinion rendered by the Attorney General of Georgia²⁶ is remarkable for its clear perception of the distinction between a government acting in direct competition with private enterprises and one performing traditional government functions. The Attorney General found that a state-run Factory for the Blind would not be subject to the Robinson-Patman Act

²⁴The District Court stated that the Supreme Court in a footnote in *Portland Retail Druggists* "noted without criticism that the trial court had dismissed counts based on sales to governmental hospitals 'for failure to state a claim.' " 656 F.2d at 99. The cited footnote, however, merely states, neither with criticism nor with approval, a procedural fact not then at issue before the Court. 425 U.S. at 4 n.2. And, as is discussed below, the earlier district court's oral, unpublished order of dismissal was based on inapplicable authority.

²⁵Opinion of Attorney General of California, 1932-1939 Trade Cas. (CCH) ¶ 55,156 at 415 (1937).

²⁶Opinion of Attorney General of Georgia, 1949 Trade Cas. (CCH) ¶ 62,455 (1949).

when it sold to the state and its agencies, but would become subject to the Act if it were to sell its products outside the state in competition with private enterprises. The opinion concluded that when the legislature authorized sales to parties other than the state, it "left the field of governmental activities and entered the field of private enterprise through interstate transactions," and "divested itself of the sovereignty by its own legislation under which it assumes to act in a proprietary capacity." *Id.* at 63,340.²⁷

II. THE AUTHORITY CITED BY THE DISTRICT COURT IS INAPPLICABLE.

A. The Decided Cases Do Not Support The District Court's Holding.

The District Court stated that "[e]very judicial decision on the question has held the Robinson-Patman Act inapplicable to governmental purchases" and that "[r]eviewing appellate courts have never disapproved such rulings." 656 F.2d at 101. The first statement is in error, however, and before this case no appellate court had ever approved such a ruling.

1. Courts Have Applied the Robinson-Patman Act to Governmental Purchases.

The District Court apparently was unaware of several decisions applying the Robinson-Patman Act to governmental purchases. For example, in *A.J. Goodman & Sons v. United Lacquer Manufacturing Corp.*, 81 F. Supp. 890 (D. Mass. 1949),

²⁷The District Court's attempt to distinguish this opinion from the instant case on the basis that the opinion addressed sales *by* a state rather than sales *to* a state, 656 F.2d at 101 n.9, must be rejected. The Attorney General's broader concern — the applicability of the Robinson-Patman Act to activity by a governmental entity in direct competition with private enterprises — does not depend on whether the state happens to be buyer or seller.

the plaintiff alleged price discrimination in sale of lacquer to the State of New Hampshire. Because the plaintiff was not an actual purchaser and injury had not been shown, the case was dismissed. Nowhere was an exemption for state purchases even hinted at.

In the recent case of *Burge v. Bryant Public School District*, *supra* note 22, the Robinson-Patman Act was applied to purchases by a public tax-supported school district, alleged to be in violation of section 2(c) of the Robinson-Patman Act because the school district required successful bidders to provide a discount. The district court granted summary judgment to the defendant on the alternative grounds that (a) the school district was covered under the Nonprofit Institutions Act and the purchases were for its "own use," and (b) the explicit exemption in section 2(c) for discounts reflecting services rendered by the purchaser was applicable. On appeal, the Eighth Circuit affirmed on the second ground "[w]ithout reaching the issue of exemption under the Robinson-Patman Act." 658 F.2d at 612. Thus both courts applied the Act to purchases by the municipal school board but found specific exemptions within the Act applicable.

Champaign-Urbana News Agency v. J.L. Cummins News Co.,²⁸ found the Robinson-Patman Act inapplicable to purchases by the Army and Air Force Exchange Service but strongly suggested that state and local governments would face an opposite result. The district court found the Exchange Service exempt because of sovereign immunity, but explicitly distinguished *Hecht v. Pro-Football, Inc.*, 444 F.2d 931 (D.C. Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972), because the governmental antitrust defendant, a board of the District of Columbia, was "more like a state agency or instrumentality." 479 F. Supp. at 287. The Court of Appeals' lengthy analysis of the Exchange Service's

²⁸479 F. Supp. 281 (C.D. Ill. 1979), *aff'd*, 632 F.2d 680 (7th Cir. 1980).

status, function, and operation, 632 F.2d at 683-87, indicates that the court rejected a general exemption of government instrumentalities from the Robinson-Patman Act. Significantly, the Exchange Service limited its sales to military personnel and their families, sales that would be considered "own use" under *Portland Retail Druggists*, 425 U.S. at 16-19.

2. The Cases Cited by the District Court Are Inapplicable.

The decisions cited by the District Court to support its position are generally inapplicable. Six of the eight cases, four of which contain only *dicta*, involve purchases by a governmental body for its own consumption; the remaining two offer only minimal analysis. Until this case, no appeals court had ever approved the district court's view.

For example, *General Shale Products Co. v. Struck Construction Co.*,²⁹ involved alleged price discrimination in bidding by a construction company for a city housing project; the court held the Robinson-Patman Act inapplicable on the ground that "[n]either the government nor a city in its purchase of property considered necessary for the purposes of *carrying out its governmental functions* is in competition with another buyer who may be engaged in *buying and reselling* that article." 37 F. Supp. at 603 (emphasis supplied).

In *Logan Lanes, Inc. v. Brunswick Corp.*,³⁰ the Ninth Circuit refused to affirm the lower court's holding of a blanket governmental immunity but found for the defendant because the purchases were for the University's own use and thus were exempt

²⁹37 F. Supp. 598 (W.D. Ky. 1941), *aff'd on other grounds*, 132 F.2d 425 (6th Cir. 1942), *cert. denied*, 318 U.S. 780 (1943).

³⁰No. 4-66-5 (D. Idaho 1966), *aff'd on other grounds*, 378 F.2d 212 (9th Cir.), *cert. denied*, 389 U.S. 898 (1967).

from the Robinson-Patman Act as amended by the Nonprofit Institutions Act.³¹

The only opinions that have found the Robinson-Patman Act inapplicable where a government institution purchased goods for resale are two unpublished district court orders, *Portland Retail Druggists Association v. Abbott Laboratories*,³² and *Mountain View Pharmacy v. Abbott Laboratories*.³³ Neither is persuasive. In neither case did the court consider or discuss the special factors present when a governmental body acts in direct competition with private businesses, and both decisions rely on authorities not applicable when the government is a competitor rather than consumer.

B. The Attorney General Opinions Cited By The District Court Do Not Address The Application Of The Robinson-Patman Act To Governmental Purchases For Resale.

The attorney general opinions cited by the District Court do not support its result. Some deal with sales to the federal government, which raise issues not applicable to state and local

³¹Four other cases cited by the District Court involve purchases for consumption and contain only *dicta*. In two cases the *dicta* cut against the District Court's holding. For example, in *Sterling Nelson & Sons v. Rangen, Inc.*, 235 F. Supp. 393, 399 (D. Idaho 1964), *aff'd*, 351 F.2d 851, 859 (9th Cir. 1965), *cert. denied*, 383 U.S. 936 (1966) (bribery of state officials in order to obtain government contracts), both the district court and court of appeals expressed skepticism about any policy exempting sales to states from the Robinson-Patman Act. And in *Sperry Rand Corp. v. Nassau Research & Dev. Ass'n*, 152 F. Supp. 91, 96 (E.D.N.Y. 1957), the court *refused* to dismiss a counterclaim alleging that sales to the U.S. Army Signal Corps violated § 2(a) of the Robinson-Patman Act.

³²No. 71-543 (D. Or., Sept. 11, 1972) (unpublished spoken opinion), *vacated on other grounds*, 510 F.2d 486 (9th Cir. 1974), *vacated on other grounds*, 425 U.S. 1 (1976).

³³No. C-77-0094 (D. Utah, Aug. 15, 1977) (unpublished order), *aff'd on other grounds*, 630 F.2d 1383 (10th Cir. 1980).

governments, and all involve governmental purchases for consumption. Thus none addresses the issue raised in this case.

The earliest opinion on this matter,³⁴ rendered by the Attorney General of the United States, did not consider states' purchases of goods for the purpose of resale in competition with private enterprises. In fact, the Attorney General considered only the applicability of the Robinson-Patman Act to the federal government. As discussed at note 18, *supra*, the Attorney General's statement of the principle of sovereign immunity — "that statutes regulating rates, charges, etc., in matters affecting commerce do not ordinarily apply to the Government unless it is expressly so provided" — does not extend to state and local governments, particularly when they act in a proprietary capacity. And the Attorney General's second argument — that prices to the federal government seldom, if ever, would cause the competitive injury required to find a violation of the Robinson-Patman Act³⁵ — reinforces the fact that the opinion does not contemplate a situation involving competition with private enterprises, like the one presented in this case.

The same limited focus is also found in the other non-judicial opinions cited by the District Court: the 1962 statement of the Attorney General,³⁶ the 1973 decision of the Comptroller General,³⁷ and the opinions rendered by the state At-

³⁴38 Op. Att'y Gen. 539 (1936).

³⁵The Attorney General also noted that discounts to the federal government are often based on the lower cost of doing business with the government, a justification which, as noted by the Attorney General of California, 1932-1939 Trade Cas. (CCH) ¶ 55,156 at 416 (1937), is expressly permitted by the Act.

³⁶Report of the Attorney General Under Executive Order 10,936, Identical Bidding in Public Procurement 11 (1962).

³⁷1973-2 Trade Cas. (CCH) ¶ 74,642.

torneys General of Minnesota,³⁸ Wisconsin,³⁹ and North Carolina.⁴⁰ These opinions generally fail to discuss or analyze the critical distinction between governmental purchases for consumption and those for resale. Where they do address the issue, they suggest that governmental purchases for resale be treated differently. As the North Carolina Attorney General commented:

It must be remembered that the purpose behind enactment of the Robinson-Patman Act was to make price discrimination unlawful where it substantially lessened or prevented competition or tended to create a monopoly. *A state agency purchasing supplies for state needs is certainly not in competition with private business enterprise. Nor should lower prices to the state interfere with the normal price competition in sales to the general public.*

1977-2 Trade Cas. (CCH) at 73,309 (emphasis supplied). The North Carolina Attorney General recognized the distinction made by the Attorney General of Georgia, discussed in Section I.D. *supra*, noting that the State of Georgia had "entered the field of private enterprise by reselling its products to individuals and corporate dealers as well as other governmental units."⁴¹ Again, this is the very type of conduct at issue in this case.

³⁸Opinion of Attorney General of Minnesota, 1932-1939 Trade Cas. (CCH) ¶ 55,157 (1937).

³⁹Opinion of Attorney General of Wisconsin, 26 Op. Att'y Gen. Wis. 142 (1937) (purchase of commercial fertilizers for agricultural experiment stations).

⁴⁰Opinion of Attorney General of North Carolina, 1977-2 Trade Cas. (CCH) ¶ 61,797 (1977).

⁴¹*Id.* The treatises cited by the District Court, 656 F.2d at 101, suffer from the same deficiencies as the cases which they summarize. They add no independent analysis, with the exception of one treatise that correctly notes that purchases for resale must be analyzed separately from purchases for consumption. See Rowe, *Price Discrimination Under the Robinson-Patman Act* 84 n.166 (1962).

drug purchases by nonprofit hospitals are exempt from the Robinson-Patman Price Discrimination Act only where made for the hospitals' "own use," pursuant to the specific exemption provided by the Nonprofit Institutions Act, 15 U.S.C. § 13c. The District Court³ in this case carved out a separate and broader implied exemption for purchases by hospitals which are owned by agencies or subdivisions of states. In granting defendants' motions to dismiss, the District Court, while accepting as true the allegations in the Complaint that local retail pharmacies had been injured by the challenged price discrimination, held that such price discrimination did not violate the Robinson-Patman Act, on the ground that there is an implied exemption for purchases by state hospitals, even where the hospitals are not the ultimate consumers but resell the purchased goods in competition with private enterprises. Thus the question in this case is whether sales to and purchases by state hospitals⁴ of goods for resale in the market place in competition with private business enterprises are exempt from the proscriptions of the Robinson-Patman Act.

The District Court's decision to imply a governmental exemption into the Robinson-Patman Act directly contradicts this Court's often-expressed presumption against implicit exemptions to the antitrust laws.⁵ The District Court's decision also

³The District Court judgment was "[affirmed] on the basis of the district court's Memorandum of Opinion" by the Fifth Circuit and appeared as an appendix to the Court of Appeals decision. *Jefferson County Pharmaceutical Ass'n v. Abbott Laboratories*, 656 F.2d 92, 93 (5th Cir. 1981). All references herein to the "District Court" refer to that Memorandum of Opinion.

⁴Except where otherwise noted, all references to state hospitals include those owned or operated by agencies or subdivisions of the state or by other local governmental entities.

⁵See *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 787 (1975); *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 350-51 (1963).

contradicts the decisions of this Court in *City of Lafayette*,⁶ *City of Boulder*,⁷ and prior cases that state and local agencies are not immune from the antitrust laws. The District Court's opinion would allow state agencies to enter freely all fields of commercial endeavor, immune from the reach of laws "as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms."⁸

The District Court made its decision despite the fact that on its face the Robinson-Patman Act, like other antitrust laws, reaches conduct by states and their subdivisions. The legislative history of the Robinson-Patman Act confirms that Congress intended that purchases by state or local governmental entities fall within the Act when those entities act in competition with other purchasers. Two years later, in the Nonprofit Institutions Act, Congress determined to exempt from the Robinson-Patman Act purchases made by nonprofit institutions "for their own use," recognizing that without this exemption such purchases, and therefore such institutions, were not exempt. The legislative history of that amendment makes clear that Congress intended this exemption to apply to governmental as well as private nonprofit hospitals. Thus purchases by state hospitals are exempt from the Robinson-Patman Act, when, and only when, they are made for consumption rather than resale.

The District Court opinion cited district court decisions, attorney general opinions, and treatises to support its holding. These authorities are inapplicable. They involve purchases by the federal government, or by a governmental entity for its own

⁶*City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978).

⁷*Community Communications Co. v. City of Boulder*, 102 S. Ct. 835 (1982).

⁸*United States v. Topco Assocs.*, 405 U.S. 596, 610 (1972).

III. THE ROBINSON-PATMAN ACT, AS APPLIED TO PURCHASES FOR RESALE BY STATE HOSPITAL PHARMACIES, REPRESENTS A LEGITIMATE AND PROPER EXERCISE OF CONGRESSIONAL POWER UNDER THE COMMERCE CLAUSE.

Although the District Court stopped short of holding that any application of the Robinson-Patman Act to state pharmacies would violate the Tenth Amendment, it identified what it believed to be "policy considerations" discussed in *National League of Cities v. Usery*, 426 U.S. 833 (1976), that prohibit federal regulation of the prices paid by such pharmacies for drugs purchased for resale. 656 F.2d at 102.

It is important at the outset to recognize this argument for what it is: a frontal assault on any application of any federal antitrust law to any economic activity of a state or county hospital pharmacy, no matter how destructive of competition and no matter how unrelated to or inconsistent with state policies in the area. Under *National League of Cities*, a state's structuring of "integral operations in areas of traditional governmental functions" is immune from federal Commerce Clause regulation. 426 U.S. at 852. The suggestion that pricing policies of state and county pharmacies are "integral operations in areas of traditional governmental functions" would, if logically applied, exempt all state conduct related to their purchase and sale of drugs from liability under all antitrust laws.⁴²

This Court has recently outlined the three stringent tests that must be satisfied before the Tenth Amendment will be held to limit congressional commerce power:⁴³

⁴²Indeed, so treating purchases by state pharmacies of drugs for resale could displace all federal regulation, non-antitrust as well as antitrust, including federal laws concerning adulteration, misbranding, and prescription of drugs.

⁴³*Hodel v. Virginia Surface Mining & Reclamation Assn.*, 101 S. Ct. 2352, 2366 (1981) (emphasis in original) (citations omitted); *United Transp. Union v. Long Island R.R.*, 50 U.S.L.W. 4315, 4317 (U.S. Mar. 23, 1982).

[I]n order to succeed, a claim that congressional commerce power legislation is invalid under the reasoning of *National League of Cities* must satisfy *each* of three requirements. First, there must be a showing that the challenged statute regulates the "States as States." . . . Second, the federal regulation must address matters that are indisputably "attributes of state sovereignty." . . . And, third, it must be apparent that the States' compliance with federal law would directly impair their ability "to structure integral operations in areas of traditional functions."

None of these tests is met in this case. Regulation of the respondent pharmaceutical companies and respondent Cooper Green Hospital⁴⁴ is clearly not regulation of the "States as States." Nor are resales of drugs in the public marketplace "attributes of state sovereignty." But it is principally the third prong of the *Hodel* test that a Tenth Amendment defense fails to meet. Purchases of drugs for resale by state hospital pharmacies are not an "integral operation" in an "area of traditional functions." Even if they were, application of the Robinson-Patman Act to such purchases would not impair, directly or indirectly, the ability of states to "structure" such purchases.

A. Application Of The Robinson-Patman Act To The Purchase Of Drugs For Resale By State Hospital Pharmacies Would Not Impair The States' Ability To Structure Integral Operations In An Area Of Traditional Function.

Viewed as it must be in the light most favorable to the plaintiff, the Complaint alleges that the defendant state and county hospital pharmacies are business enterprises engaged in com-

⁴⁴Cooper Green appears to be a public corporation organized under Article of the Alabama Code and separate from the county itself. Section 22-21-178 of the Alabama Code provides, "No hospital authorized under this article [6] shall have governmental sovereignty or immunity," and section 22-21-182(e) provides, "All debts created . . . by the corporation shall be solely and exclusively an obligation of the corporation and shall not create an obligation or debt of the state of Alabama or of any county"

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mercial competition in the retail sale of drugs in Jefferson County. The Tenth Amendment does not prohibit federal regulation of commercial enterprises run by state or local governments.⁴⁵

Just as the operation of railroads "has traditionally been a function of private industry, not state or local governments" and is therefore subject to federal regulation, *Long Island Railroad*, 50 U.S.L.W. at 4317 (footnote omitted), so too is the operation of retail drugstores.⁴⁶ Like the railroads, interstate commerce in drugs has long been subject to substantial federal regulation. It is simply too late in the day to claim that Congress may not regulate the activity of a state when it acts in a proprietary capacity outside the sphere of its traditional governmental functions.⁴⁷

Although some aspects of hospital services may be an integral portion of those services which the states have traditionally afforded their citizens, *National League of Cities*, 426 U.S. at 855,

⁴⁵A limited but useful analogy can be found in cases recognizing a "commercial activity" exception to the *Noerr-Pennington* doctrine, which recognizes that Congress intended the Sherman Act to reach anticompetitive conduct involving the government acting not in its political capacity but as a simple participant in the marketplace. *Hecht v. Pro-Football, Inc.*, 444 F.2d 931, 941-42 (D.C. Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972); *George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc.*, 424 F.2d 25, 31-34 (1st Cir.), *cert. denied*, 400 U.S. 851 (1970). Like antitrust analysis involving First Amendment concerns, antitrust analysis involving Tenth Amendment concerns can properly treat governmental political activities differently from governmental commercial activities.

⁴⁶That NARD was founded in 1898 attests to the longstanding private nature of the retail prescription drug market.

⁴⁷*See, e.g., California v. United States*, 320 U.S. 577 (1944) (city and state are subject to federal shipping regulation); *Union Pacific R.R. v. United States*, 313 U.S. 450 (1941) (Section 1 of Elkins Act, an anti-price discrimination statute similar to Robinson-Patman Act, is applicable to cities); *Ohio v. Helvering*, 292 U.S. 360, 369 (1934) (whenever state engages in business of private nature, that business is not withdrawn from taxing power of nation).

the state cannot place a proprietary activity under the hospital umbrella and thereby immunize it from federal regulation. See *Long Island Railroad*, 50 U.S.L.W. at 4318; *Williams v. Eastside Mental Health Center*, 699 F.2d 671, 680 (11th Cir. 1982) (provision of mental health services to Alabama citizens is not integral governmental function). Retail sales of drugs to people who are not hospital patients are, by definition, by tradition, and by current practice, separate and independent from any traditional or integral state function regarding the provision of hospital care. Private pharmacies now account, and historically have accounted, for the major share of all drugs sold at retail.⁴⁸

Even if the retail sale of drugs to nonpatients were part of the integral operations of an area of the states' traditional functions, application of the Robinson-Patman Act to discriminatory pricing of purchases by state pharmacies would not impair a state's ability to "structure" such operations. Requiring that purchases for resale be made at nondiscriminatory prices would have no impact on state or county treasuries,⁴⁹ nor would it force the state to restructure its purchasing operations, factors cited in *National League of Cities*.⁵⁰

⁴⁸State and local government hospitals purchase approximately 4% of the pharmaceuticals sold, only a portion of which is resold at retail. See *supra* note 2.

⁴⁹Nothing in the record suggests that the defendant pharmacies fail to pass the full purchase price of drugs on to retail customers or that they would fail to do so if they were to pay a higher, non-discriminatory price.

⁵⁰426 U.S. at 846-48. Even if this Court were to find that application of the Robinson-Patman Act to purchases for resale would impair a state's "ability to structure integral operations in areas of traditional functions," the state action doctrine of *Parker v. Brown*, 317 U.S. 341, 350-51 (1943), could, in proper circumstances, apply to action by a state as a state in its sovereign capacity. The availability of the *Parker* defense "makes it difficult to see how *National League of Cities* is even tangentially implicated" by imposing antitrust liability on anticompetitive activities not authorized by state policy. *City of Lafayette*, 435 U.S. at 413 n.42 (plurality opinion).

B. As Applied To Purchases Of Drugs By State And Local Government Pharmacies In Alabama For Resale, The Robinson-Patman Act Does Not Interfere With Any Clearly Expressed And Affirmatively Articulated State Policy.

Liability under the Robinson-Patman Act for price discrimination in governmental purchases for resale is not barred by the Tenth Amendment because no integral state function will be impaired. Even if any integral state function were affected, however, the Tenth Amendment protects only "considered policy choices" of the states acting in their sovereign capacity, *National League of Cities*, 426 U.S. at 848, or, using the terminology from antitrust cases involving the *Parker* doctrine, activities pursuant to a "clearly articulated and affirmatively expressed" policy of the state as a state. *City of Boulder*, 102 S. Ct. at 841. The State of Alabama has no policy, much less a clearly articulated and affirmatively expressed policy, to compel or even authorize price discrimination in purchases for resale by state or local agencies.

The only policy basis that the District Court identified for the challenged purchasing activities is Alabama's competitive bid law. That law is a typical governmental procurement statute designed to ensure that state and local agencies pay no more than, and *not* that they pay less than, the competitive price for the goods they purchase. That law basically requires that certain state and local agencies must use competitive bidding for certain purchases of supplies⁵¹ and must accept the lowest responsible bid they receive.

⁵¹It is not apparent from the record that the competitive bid law even applies to the purchases of drugs that are the subject of this lawsuit. Because there is no showing that all drugs purchased for resale are purchased in lots worth \$2,000 or more or under circumstances where there are multiple sources, each of which is a prerequisite to the law's applicability, Ala. Code §§ 41-16-20, -21(a), -50(a), and -51(a)(10) (Michie Supp. 1981), the bid law cannot on this record be found to apply to every challenged purchase.

One searches the competitive bid law in vain for any articulation of any policy to compel or authorize purchases at *less* than competitive prices. To the contrary, "[w]hen the government acts under laws requiring competitive bidding, it signifies its intent to respond to the signals of a competitive market on the same terms as any other consumer" Surely the defendant drug manufacturers would not have violated any policy or law or become subject to any state sanctions if they had chosen to offer their goods to government pharmacies for a non-discriminatory, competitive price. Indeed, a state's insistence on competitive bidding is inconsistent with authorizing its purchasing agents to act anticompetitively.⁵³

The state competitive bid law is at most neutral with respect to price discrimination. "But plainly the requirement of 'clear articulation and affirmative expression' is not satisfied when the State's position is one of mere *neutrality* respecting the [governmental] actions challenged as anticompetitive."⁵⁴ The courts have refused to interpret broad, general statutory grants of operating authority, like Alabama's competitive bid law, as state sanctions for anticompetitive behavior.⁵⁵

⁵²George R. Whitten, Jr., Co. v. Paddock Pool Builders, Inc., 424 F.2d 25, 31 (1st Cir.), *cert. denied*, 400 U.S. 850 (1970).

⁵³See 1 P. Areeda & D. Turner, *Antitrust Law* ¶ 214 at 90 (1978).

⁵⁴*City of Boulder*, 102 S. Ct. at 843 (emphasis in original); see *Goldfarb v. Virginia State Bar*, 421 U.S. at 791 (to be exempt, anticompetitive activities of state agency must be not merely "prompted" by state action" but rather "compelled by direction of the State acting as a sovereign").

⁵⁵See *Duke & Co. v. Foerster*, 521 F.2d 1277, 1281 (3d Cir. 1975) (no implied statutory authority that "mandates or permits discrimination against certain suppliers"); *Corey v. Look*, 641 F.2d 32, 37 (1st Cir. 1981) (authority to purchase and operate parking lots "simply empowers the [defendant state agency] to behave as an ordinary economic agent," but does not empower it to engage in commercial boycotts); cf. *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 706-07 (1962) (argument that company was acting as agent of Canadian law states no defense to antitrust claim because

The Tenth Amendment was not intended to protect actions not taken pursuant to a clearly articulated sovereign state policy. To exempt the defendant state and local government pharmacies from liability under the Robinson-Patman Act on the basis of this record would further no demonstrated interest of the State of Alabama and would undermine a substantial federal interest in the vigorous enforcement of the antitrust laws and the competitive operation of the interstate market in drugs.

IV. CONCLUSION

The decision of the Court of Appeals permits state hospitals to obtain discriminatory price concessions from pharmaceutical manufacturers and to use that advantage in retail competition with independent pharmacists. This anticompetitive price advantage is prohibited by the Robinson-Patman Act, which extends to all "persons," a term this Court explicitly has applied to state governments.

The legislative history of the Robinson-Patman Act confirms that the Act means what it says: its author explained that the Act would apply to purchases by state hospitals for resale in competition with other parties. Congress' intent was further demonstrated two years after passage of the Robinson-Patman Act when it narrowed the original Act by exempting purchases by nonprofit institutions of "supplies for their own use"; the amendment's sponsor made unmistakably clear the congressional intent to include within its scope hospitals operated by state, county, and city governments. Congress would not have included governmental entities within this limited exemption if they were already categorically exempt from the provisions of the Act.

"[t]here is nothing to indicate that such law in any way compelled discriminatory purchasing").

This Court on numerous occasions has refused to find implied exemptions to the antitrust laws. It recently reaffirmed that the antitrust laws apply to health care.⁵⁶ It has enforced Congress' intent that the antitrust laws apply by their terms, that they be broadly construed, and that special exceptions not be carved out. There is no policy reason to change that view in this case by constructing a *per se* exemption for state hospitals when they engage in proprietary activities in competition with retail druggists and private hospitals. Congress did not intend or provide such an exemption, and there is neither justification nor need for the courts to create one. Retail druggists should not be forced to compete on unfair terms against state hospitals that can use their superior bargaining position to obtain more favorable prices — the very evil the Robinson-Patman Act was intended to prevent. State government is entitled to no special antitrust immunity when it undertakes commercial activities in competition with private enterprises.

The dissenting opinion below of Judge Clark aptly summarizes what is involved in this case:

[t]he decision permits the six states of this circuit and their agencies to unfairly compete with private enterprises operated by their citizens in the retail sale of goods. A state's size gives it great purchasing power and thus an awesome competitive advantage over private business. To this the court adds the advantage of a license to make use of price discrimination in its wholesale purchases.

* * * *

Instead of creating an exemption to the statute, I would follow the policy underlying the antitrust laws. I would hold that, for the purposes of the Robinson-

⁵⁶National Gerimedical Hospital and Gerontology Center v. Blue Cross, 452 U.S. 378 (1981); *see also* Hospital Building Co. v. Trustees of Rex Hospital, 425 U.S. 738 (1976).

Patman Act, when a state moves outside its traditional sphere of activity and into retail competition with private enterprise, it should be treated in precisely the same manner as its competitors. Today's decision subverts the policy behind the Robinson-Patman Act. It subjects businessmen, who suddenly have found themselves in competition with pharmacies owned by the State of Alabama, to the unfortunate effects of unfair competition without affording them a remedy. This result is not only inequitable, it is in direct conflict with the language and major thrust of the Act.

656 F.2d at 93-94.

WHEREFORE, the National Association of Retail Druggists respectfully urges this Court to reverse the judgment of the U.S. Court of Appeals for the Eleventh Circuit and to hold that purchases of drugs by hospital pharmacies that are owned by a state or subdivision thereof are exempt from the Robinson-Patman Act only to the extent they are made for the hospital's own use, as provided in 15 U.S.C. § 13c.

Respectfully submitted,

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April 22, 1982

THIRD PARTY PREPAID PRESCRIPTION
PROGRAMS

A REPORT

OF THE

SUBCOMMITTEE ON ENVIRONMENTAL PROBLEMS
AFFECTING SMALL BUSINESS

TO THE

SELECT COMMITTEE ON SMALL BUSINESS

HOUSE OF REPRESENTATIVES

NINETY-SECOND CONGRESS

FIRST SESSION

PURSUANT TO

H. Res. 5 and 19

RESOLUTIONS CREATING A SELECT COMMITTEE
TO CONDUCT STUDIES AND INVESTIGATIONS
OF THE PROBLEMS OF SMALL BUSINESS



NOVEMBER 29, 1971.—Committed to the Committee of the Whole House
on the State of the Union and ordered to be printed

U.S. GOVERNMENT PRINTING OFFICE

68-006 O

WASHINGTON : 1971

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(II)

LETTERS OF TRANSMITTAL

HOUSE OF REPRESENTATIVES,
SELECT COMMITTEE ON SMALL BUSINESS,
Washington, D.C., November 18, 1971.

HON. CARL ALBERT,
The Speaker, House of Representatives,
Washington, D.C.

DEAR MR. SPEAKER: Transmitted herewith is a report of the Subcommittee on Environmental Problems Affecting Small Business entitled "Third Party Prepaid Prescription Programs."

This report is submitted with the approval of the full committee.

With kindest regards and best wishes, I am,

Very sincerely yours,

JOE L. EVINS,
Member of Congress, Chairman.

HOUSE OF REPRESENTATIVES,
SELECT COMMITTEE ON SMALL BUSINESS,
Washington, D.C., November 18, 1971.

HON. JOE L. EVINS,
Chairman, Select Committee on Small Business, House of Representatives,
Washington, D.C.

DEAR MR. CHAIRMAN: Transmitted herewith is a report of the Subcommittee on Environmental Problems Affecting Small Business entitled "Third Party Prepaid Prescription Programs."

The report, transmitted to you as chairman of the Select Committee on Small Business, has the approval of the subcommittee.

With kind regards,

WILLIAM L. HUNGATE,
Chairman, Subcommittee on Environmental
Problems Affecting Small Business.

(III)

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Union Calendar No. 332

92D CONGRESS } HOUSE OF REPRESENTATIVES { REPORT
1st Session } No. 92-683

THIRD PARTY PREPAID PRESCRIPTION PROGRAMS

NOVEMBER 29, 1971.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. EVINS, from the Select Committee on Small Business,
submitted the following

REPORT

[Pursuant to H. Res. 5 and 19]

(VII)

THIRD PARTY PREPAID PRESCRIPTION PROGRAMS

CHAPTER I. BACKGROUND AND PURPOSE OF HEARINGS

INTRODUCTION

With the opening of the 92nd Congress and the organization of the House Small Business Committee, the chairman of the committee, Representative Joe L. Evins, Democrat, of Tennessee, announced that the Subcommittee on Environmental Problems Affecting Small Business would conduct investigations and hearings pertaining to problems which small businessmen were experiencing as a result of the recent implementation of third party prepaid prescription programs. The members of the subcommittee were designated by Chairman Evins as follows:

Representative William L. Hungate, Democrat, of Missouri, Chairman;
 Representative Neal Smith, Democrat, of Iowa;
 Representative Charles J. Carney, Democrat, of Ohio;
 Representative Bob Bergland, Democrat, of Minnesota;
 Representative James D. (Mike) McKeivitt, Republican, of Colorado;
 Representative Frank Horton, Republican, of New York; and
 Representative Manuel Lujan, Jr., Republican, of New Mexico.
 Additionally, Chairman Evins and Representative Silvio O. Conte, Republican, of Massachusetts, ranking minority member, are ex officio members of the subcommittee.

SCOPE AND PURPOSE OF HEARINGS

The committee has received numerous complaints over the last few years in regard to third party programs. Retail pharmacists have written the committee complaining that these programs are forcing many small drugstores out of business while causing a severe economic and administrative burden on those fortunate enough to survive. Complaints focused on: inadequate professional fees; length of time for reimbursement; multiple claim forms; and refusal of plan administrators to discuss problems with druggists.

Congress has charged the House Small Business Committee to conduct studies and investigations of the problems of all types of small business, and to obtain all facts possible in relation thereto which are of public interest and which will aid Congress in enacting remedial legislation. It was with this duty in mind that these hearings were scheduled.

PLACES AND DATES

Hearings were held in Washington, D.C., on July 7, 8, and 9, 1971. Testimony was received from various trade organizations, State and local pharmacy associations, individual druggists, private insurance carriers and administrators of third party plans, and government agencies.

In addition to numerous individual pharmacists from such States as Tennessee, Ohio, California, New York, and Illinois, the subcommittee received testimony from representatives of the following organizations: National Association of Retail Druggists, Blue Cross Association, Metropolitan Life Insurance Co., National Pharmacy Insurance Council, Metropolitan Detroit Pharmaceutical Association, Illinois Pharmaceutical Association, Missouri Pharmaceutical Association, National Association for the Protection of the Pharmaceutical Profession, Ohio State Pharmaceutical Association, Department of Justice, and the Federal Trade Commission.

The subcommittee received testimony from as many interested parties as possible including written statements from witnesses who were unable to attend and present oral testimony.

CHAPTER II. FINDINGS

Prepaid prescription plans are an extension of other third party prepaid medical programs such as medical and conventional out-of-hospital health insurance programs. Basically, prepaid prescription plans contemplate a program which reimburses the pharmacist for all or part of the subscriber-patient's prescription cost, although the subscriber is usually required to pay a small "deductible" which is sometimes referred to as a "co-pay." This amount normally runs between \$1 and \$2 per prescription.

Prepaid prescription plans in the private sector are programs for reimbursement directly to a contract member pharmacy for the cost of the drug plus a fixed fee for the pharmacist's professional services in filling the prescription. The method of determining costs and fixed fees varies considerably from plan to plan, although in most instances these methods are set forth in a contract between a member pharmacy and the insurance carrier, or plan administrator.

ANTITRUST CONSIDERATIONS

The independent retail pharmacists indicated that a basic problem in regard to prepaid prescription programs has been the inability to collectively voice their position with respect to the operation of such programs. The Department of Justice has warned that pharmacists may not collectively approach plan administrators to discuss aspects of plans which will affect pricing. This policy is based on the Department's interpretation of the antitrust laws that such discussions might be a violation of the Sherman Act. Therefore, plan administrators have refused to meet with representative pharmacy groups. On the basis of this interpretation and advice and counsel of their attorneys, pharmacists have been forced to resort to dealing with plan administrators and sponsors on an individual basis. This has proved ineffective because plan administrators will not negotiate or discuss fees with an individual pharmacist.

Insurance carriers who administer prepaid prescription plans formulate a program in conjunction with a sponsor, usually a union or corporation, and then present the predetermined contract to independent pharmacies on a take-it-or-leave-it basis. The only choice given to an independent pharmacist is either to participate in the program as dictated by the plan administrator or forego a sizable portion of his business, depending on the number of his usual customers who become members of such programs.

The committee finds that the antitrust laws have been interpreted to preclude the independent retail pharmacist from attempting to deal collectively with large insurance carriers which administer plans and equally large prepaid prescription plan sponsors.

Although it does not appear that unilateral price fixing by plan administrators involves any collective conspiracy on the part of com-

petitors, the effect on consumers and a competitive free economic system is basically the same. Regardless of who sets the price, and whether or not this price is reasonable, the end result is the same: the price to be paid by consumers (the amount of the co-pay) is the same for all drugstores. The effect of this may be to eliminate competition among pharmacists in regard to prescriptions, which would be in direct conflict with the intent of Congress in enacting antitrust legislation.

A solution to the problem would be to develop an antitrust policy whereby plan administrators and sponsors may be permitted, under definitely defined guidelines of the antitrust laws, to consult with representatives of pharmaceutical groups with respect to a wide range of factors involved in such programs, including a reasonable range of compensation in light of the professional and other services to be performed by the pharmacist.

While the committee is fully cognizant of the danger of antitrust violations, as were many of the witnesses testifying in behalf of independent druggists, the committee believes it may be possible to devise a system whereby some input from individual pharmacists on matters affecting price can be presented to plan carriers by representative pharmacy associations without doing violence to the antitrust laws.

In this connection, the committee noted that a principal witness for the independent druggists suggested that a fair appraisal of the antitrust laws might permit consultation between representatives of pharmaceutical groups with respect to a wide range of factors involved in these programs, including price. In presenting the proposal, it was freely acknowledged that there is a narrow line between such consultation and prohibited price negotiation and it was specifically further acknowledged that such discussions could not "bind" individual member pharmacists either to cooperate with or to boycott such plans. The committee would go further and stress that it is not merely of concern that such representatives may not, indeed cannot, "bind" members; they cannot even suggest or impliedly encourage such concerted action under existing law.

The subcommittee notes that the Department of Health, Education, and Welfare has conducted a study of this problem in connection with the programs it administers (see, *Reports of the 1971 Advisory Council on Social Security*, House Document No. 92-80), but the subcommittee has no knowledge of any study that has been made which included careful consideration of antitrust aspects of prepaid prescription plans, both private and public. The subcommittee is also mindful that the trend in the direction of greater use of such plans is expected to increase rapidly, so it does not wish to encourage a proliferation of redundant studies. It is therefore imperative that a study be convened promptly for the purpose of developing antitrust guidelines implementing a system of consultation between pharmacy representatives and plan administrators. Such a study should be organized and directed by the Federal Trade Commission in consultation with the Department of Justice; and the Department of Health, Education, and Welfare; insurance carriers, pharmacy representatives and the public.

FIXED FEE AND ACQUISITION COSTS

One of the most frequent complaints by pharmacists is the amount of the fixed fee and the method used to determine acquisition costs.

In nearly all instances, sponsors or program administrators determine a flat fee to be paid a member pharmacist for his professional services in filling a prescription. This fee is the same, irrespective of the cost of the drug or the number of units dispensed.

Typically, plans limit prescriptions to a 34-day supply or 100-unit dosage. In some instances, plan administrators require pharmacists to pay a sales tax from this fixed fee. Thus, in the case of a \$10 prescription for which a pharmacist receives a fixed fee of \$2, a 4% sales tax amounting to 40¢ would be deducted from the fee, leaving a balance of \$1.60. Such an arrangement clearly is inequitable to the pharmacist.

In addition to the fixed fee, the member pharmacist is reimbursed for acquisition costs, which in most instances are determined by the plan administrator. In some cases, this means the lowest cost drug which the pharmacist then has in stock, even though the pharmacist dispenses a more expensive drug which, in his professional opinion, he feels is of better quality. Pharmacists state they are thereby placed in a dilemma of either filling a prescription with a drug which they may feel is of poor quality, or dispensing a better quality drug without being fully reimbursed.

The fixed fee concept may have the effect of ignoring the wide variability and the cost and quality of professional services rendered by pharmacists. These variables can be identified and grouped in such a manner as to more accurately reflect real cost. It is unrealistic and inequitable to require an identical fixed fee for drugstores which have different characteristics (such as an urban location as compared with a rural location).

At least one plan now does have a dual fee system which pays more to pharmacists providing such complete professional services as 24-hour emergency prescription and delivery service, individual prescription records, and which has a program of continuing education for its pharmacists. The subcommittee finds such incentives laudable, and urges all plan carriers to consider their use. In this way such plans could in fact lead to improved pharmacy services instead of contributing to their deterioration, as some fear now is the case.

Although plan administrators refuse to negotiate or confer individually with independent pharmacists, large chainstore operations encompassing numerous drugstores in one area are afforded a more advantageous position to obtain the fee they feel is necessary. This is because it is incumbent upon plan administrators to obtain participation of chainstores in order to have many convenient outlets for prescription services for member-patients. While no hard evidence of such price discrimination was presented to us, such a danger requires vigilant attention to be prevented.

REIMBURSEMENT

Following the filling of a prescription, a member pharmacist files a claim for reimbursement with the particular insurance underwriter administering the plan. In many cases, the pharmacist is required to wait from 20 to 60 days before he receives reimbursement, and in some instances this may take up to six months. A few plans are able to provide reimbursement to a majority of pharmacists within a matter of 10 to 14 days. However, in no case does the pharmacist receive interest on the money due him, although he is required

to pay for drugs he has purchased and to meet his payroll requirements. This may mean he will have to borrow sufficient cash in order to continue in business and meet the demands of his creditors.

Reimbursement is made directly to the pharmacy in the case of a contract member pharmacy or participating pharmacy. If a member-patient procures a prescription from a non-participating pharmacy, within a defined area reimbursement is made to the patient, and in most cases reflects only 75 percent of the cost of the prescription. Therefore, a patient is penalized if he wishes to do business with a pharmacist who chooses not to participate in the plan.

In some instances, reimbursement is handled by an intermediary, or agent, under contract with a plan administrator. In these circumstances, the pharmacists may be required to pay an additional fee to the agent who processes the claims.

ADMINISTRATIVE BURDENS

Member-pharmacists are required to perform a tremendous amount of paperwork in connection with prepaid prescription programs. In some cases, they are required to keep a listing or inventory and actual cost of drugs (in addition to those already required by all levels of government in connection with narcotics). In nearly every case, the member-pharmacist is required to stock one or more forms which are transmitted to plan administrators for reimbursement.

In some instances, the subcommittee was told the time required by a pharmacist to perform the necessary paperwork exceeds the time required to fill the prescription. The additional burden of processing paperwork constitutes a cost in terms of time consumed by pharmacy personnel, which cost is not reimbursed by the insurance carrier. Pharmacies which heretofore kept patient record cards have abandoned reportedly the same because of the added administrative burdens of prepaid prescription programs. This is a serious loss to member-patients of beneficial services which had been provided previously.

It is clear that a simplified and uniform system must be devised for filing claim forms. Recordkeeping by pharmacies should be reduced to a minimum, and indiscriminate investigative procedures by plan administrators of customer prescription records should be revised and standardized so as to alert the pharmacists as to their responsibilities and duties. Such procedures should also recognize that some jurisdictions may prohibit investigations of certain records.

PRESSURE TO COMPROMISE QUALITY OF PROFESSIONAL SERVICES

As previously mentioned, plan administrators, or State agencies in the case of medicaid, may require a member-pharmacist to dispense the lowest cost drug he then has in stock. Where this type of requirement is found, druggists assert they may face pressure to compromise their professional judgment, by dispensing a drug which they may feel is ineffective or otherwise unsafe to use.

Some States prohibit pharmacists from prescribing drugs or altering a prescription made by a physician, although some of these jurisdictions will permit a pharmacist to substitute a drug with another of the same formula but a different trade name.

A pharmacist, because of this professional training and experience, should be free to dispense those drugs which, in his professional judgment, he feels to be of sufficient quality.

There can be no doubt that pharmacy is a profession on an equal footing with law or medicine. A pharmacist is required to complete long and arduous training and education, and must successfully pass a rigorous state pharmacy examination.

To allege that pharmacists merely transfer pills from one bottle to another is to totally ignore the professional knowledge required to accurately and competently complete a physician's requirement for his patient's medicines.

Pharmacists also perform valuable services to the community in working with drug abuse programs and assisting law enforcement officers in detection and identification of drugs. This valuable service cannot be emphasized enough in light of the drug abuse problem so prevalent in our society.

CONSUMER ASPECTS

An underlying issue in connection with prepaid prescription plans is the position of the member-patient with regard to the cost of prescriptions. It is important to note that the basic principle of prepaid prescription plans may result in reducing the cost of health services, which the committee finds most commendable. However, certain aspects of these programs may, in fact, be adverse to the member-patient in terms of both cost and professional services.

The fixed, uniform co-pay in effect reduces the member-patient's incentive to discern competitive differences between member pharmacies, at least in regard to price. The public pays the same for each prescription, regardless of where purchased (if a participating pharmacy, which is the general rule). In some of the larger cities this may not apply since some pharmacies reportedly advertise that the full amount of the co-pay will not be charged.

Pharmacists assert that requirements by plan administrators in regard to dispensing the lowest cost drug then in stock may also seriously affect the consuming public. The patient who once relied on the pharmacist's professional judgment in selecting the appropriate brand of drug, where the physician has not so designated, may no longer have the same confidence that he can continue to rely on that independent judgment.

The fact that most plans require the member-patient to purchase drugs from a participating pharmacy or receive less than the full amount of reimbursement places an undue hardship on the member-patient of a plan. He may be required to drive considerable distance in order to find a participating pharmacy, particularly if the customer lives in a rural community.

FUTURE OF INDEPENDENT PHARMACIES

Probably the most severe adverse consumer aspect of prepaid prescription plans is the possibility of the eventual loss of many independent retail pharmacies, if the present administration of such plans is continued as it now exists. While the subcommittee was not presented direct evidence that these plans have already led to the

closing of independent pharmacies, it must be noted that the plans are a relatively new phenomenon and it may still be true that their improper administration has caused serious economic hardships. The subcommittee cannot ignore, moreover, the fact that the number of pharmacies has been steadily decreasing over the last decade from 51,448 in 1958 to 46,244 in 1967, and further decreases are indicated, even though the number of prescriptions has increased, as has the population.

The local independent retail pharmacy has long been a vital force in the local community for the betterment of the public's health care. In most instances, the pharmacist is available 24 hours a day for emergency service. He provides a vital link between the patient and his physician.

In addition to being a professional, the local pharmacist is a small businessman, and as such is a viable part of the Nation's economy. He provides jobs within his local community for youth and persons needing additional employment. The local pharmacist is usually a strong supporter of local civic affairs and sponsors many youth and athletic activities. The future of the independent pharmacist is of vital concern to the Nation.

CHAPTER III. CONCLUSIONS AND RECOMMENDATIONS

CONCLUSIONS

The subcommittee is of the opinion that the position of independent retail pharmacies may rapidly deteriorate under the present development and implementation of prepaid prescription programs.

While prepaid prescription programs are a relatively new phenomenon, the impact of which is impossible to fully assess at this time, the subcommittee concludes that many present practices employed in administering them are unduly onerous and, in particular, that by their very nature, they involve an imbalance of power between plan carriers and individual druggists which is especially serious in the case of independent small business pharmacists.

Of particular concern to the subcommittee in this connection is the present interpretation of the antitrust laws which permits program sponsors and administrators jointly to determine pharmacy fees and contract terms and conditions, while prohibiting independent pharmacies, which are most affected by such programs, from having any collective voice in the development of such plans. The independent pharmacy is, therefore, subject to the demands and dictates of third parties who may not appreciate and understand the particular problems of small business.

The subcommittee is of the opinion that the present situation must be altered in the immediate future to protect this vital sector of the small business community. The subcommittee feels that such changes can be made without adverse effects on consumers or program sponsors and administrators.

As a result of the pharmacists' inability to collectively negotiate with program administrators, a multitude of problems has surfaced.

In some areas, fixed fees are inadequate and require a pharmacist to absorb the sales tax. The method of determining acquisition costs, in some instances, may dampen a pharmacist's initiative to purchase drugs at the lowest wholesale price. Some plans are entirely too slow in reimbursing a participating pharmacy and may require administrative procedures greatly out of proportion to practical and realistic requirements.

The subcommittee is of the opinion that prepaid prescription programs may be a decisive factor in the future existence of independent pharmacies. It is important that these problems be recognized and adequately dealt with at this early stage in the development of such programs.

Program administrators and sponsors are to be commended for developing and initiating an ingenious concept to assist the Nation's health care needs. The subcommittee is cognizant of plan administrators' efforts to cooperate with independent pharmacies and of the fact that some problems will be solved in due course of time. However, in spite of commendable efforts by administrators and sponsors,

independent pharmacies are experiencing severe problems due to circumstances beyond their control, and in some instances beyond the control of administrators and sponsors. These problems must be acknowledged by all concerned and appropriate action taken to assure an equitable participation in these programs by independent pharmacists.

RECOMMENDATIONS

The recommendations of the subcommittee are as follows:

1. That program administrators—usually insurance companies—and representatives of affected Federal agencies meet with representative groups of independent pharmacists for the purpose of developing a uniform claim form, thereby eliminating time-consuming paperwork now required of druggists.
2. That the administrative procedures of prepaid prescription programs be reexamined with a view to cutting redtape to a minimum.
3. That the professional fee to be paid to pharmacists compounding prepaid prescriptions be flexible and based on variable factors rather than rigid and inflexible.
4. That program sponsors and administrators revise their procedures for reimbursement so that participating pharmacies can receive prompt reimbursement for prepaid prescriptions.
5. That, to insure that the operation of third party plans is equitable to all parties—pharmacists, program sponsors and consumers—the Federal Trade Commission, in consultation with the Department of Justice, Department of Health, Education, and Welfare, the public, insurance carriers, and pharmacy representatives, develop antitrust guidelines implementing a system of consultation between pharmacy representatives and plan administrators. Keeping in mind the narrow line between permissible consultation and prohibited negotiation, such consultation should include matters affecting professional fees and pharmacy costs.
6. That this committee be advised by appropriate parties no later than February 1, 1972, on action taken in connection with this report and the recommendations of the subcommittee.

The National Restaurant Association appreciates the opportunity to appear before the Committee to discuss legislative concerns for the 98th Congress. Though many people think of the foodservice industry as being dominated by the large, nationally-known chains, the fact is that food and beverage establishments are predominantly small business. Ninety-four percent of our establishments have annual gross sales under \$500,000. Eighty-five percent are single units, and 61 percent are sole proprietorships or partnerships. Therefore, the National Restaurant Association is particularly happy to appear before this Committee today and looks forward to working with this Committee in the future.

There are a number of general small business issues in which the National Restaurant Association has a keen interest and concern. Among those are minimum wage increase, revising the enforcement provisions of the Fair Labor Standards Act, the small business size standards, Social Security Reform and regulatory reform. However, my comments today will focus on two issues that pose particular problems for the foodservice industry.

The first area relates to illegal aliens. As you all are familiar, legislation was introduced in the 97th Congress to control the flow of undocumented aliens into this country and to limit the number of legal aliens allowed to immigrate. Regarding this legislative, the National Restaurant Association had reservations over how the employer is to determine who was eligible for employment and who is not. Barring the implementation of a national ID card, it is unclear whether a definitive identification would

be available under this legislation. To the smaller restaurant operator, this unclear and complex eligibility procedure created some serious compliance problems; particularly, in light of the resultant employer sanctions. As you may recall, a study by the General Accounting Office showed that employer sanctions, as a means of controlling illegal immigration, have met with little success in other countries.

The final point I would like to address is a portion of the overall Tax Equity and Fiscal Responsibility Act of 1982. Specifically, I am referring to the tip reporting and tip allocation provisions contained in Section 314 of the Act. Although it took effect only on Jan. 1, 1983, the cumbersome requirements contained in the law have already created some monumental problems for the small restaurant operator in the areas of bookkeeping and employer-employee relations. Basically, this law requires employers to allocate undeclared tip income to their employees if the employees as a group do not report tips at a rate of eight percent of gross sales. This allocation calculation may take place at least once a month and requires a seven step mathematical formula for each of a restaurant operator's tipped employees. Not only that, but the operator must keep track of the dollar amount of food and beverages served by each of his employees. Quite obviously, this has resulted in a bookkeeper's nightmare for the small, independent restaurant operator. Additionally, by the operator having to impute undeclared tip income to his employees, serious employer-employee relation problems have resulted. Generally speaking, employers are being placed in an untenable

position between their employees and the IRS. In fact, a number of operators have expressed that they feel like IRS agents in their own restaurants. However, I would like to add that the National Restaurant Association is coordinating with Senator Dole's office in working out a resolution to some of the more complicated aspects of this tip reporting law.

On behalf of the National Restaurant Association, I would like to thank the Committee for this opportunity to express two concerns of the small, independent operator.

STATEMENT OF

SHELDON I. LONDON

On Behalf of

JEWELERS OF AMERICA, INC.

NATIONAL DECORATING PRODUCTS ASSOCIATION

NATIONAL RETAIL HARDWARE ASSOCIATION

PHOTO MARKETING ASSOCIATION INTERNATIONAL

RETAIL FLOORCOVERING INSTITUTE

BEFORE THE

COMMITTEE ON SMALL BUSINESS

OF THE

UNITED STATES SENATE

February 25, 1983

My name is Sheldon I. London and I serve as Legislative Counsel to the Jewelers of America, Inc., National Decorating Products Association, National Retail Hardware Association, Photo Marketing Association International, and Retail Floor-covering Institute, upon whose behalf I appear today. These national trade associations represent approximately 50,000 member firms. Because the Senate Committee on Small Business is an important forum for small business, we welcome this opportunity to participate with you in framing a Committee agenda for the 98th Congress.

I want to confirm to the members of the Committee and the professional staff that you are very important to the small business community. For the nineteen years that I have worked as an attorney in Washington, I have long considered this the most important forum for small business. I was one of the first witnesses before the Senate Rules Committee to testify in support of S. Res. 104, which gave this Committee legislative responsibility for the Small Business Administration.

In all candor, the retailers who are members of the associations that I represent don't have a great deal of interaction with the Small Business Administration. Thus, your SBA oversight work is less important to them than your other principal function, which is to study and investigate problems encountered by small business.

A good example of the Committee's investigative work were the hearings held on the paperwork burden on small business. I take great pride in the fact that I was a witness at the initial hearing on this subject conducted by Senator Thomas McIntyre. The hearings were an enormous success. They raised the consciousness level of the Congress on that very important issue. At the same time, they galvanized the business community to demand changes. It is that type of initiative that I think is so very important.

I believe that today's hearing for this Committee, with the many witnesses scheduled, will truly be "a long day's journey into night." But, as you listen to witness after witness replicate each other's testimony, it is important for you to know that the small business community is depending on you. I would not have taken the time today if I felt that this was going to be a rhetorical exercise.

I was rather heretical when I came here two years ago and said to the Small Business Administration that the retail associations I represent "don't want your help; don't need subsidies; don't need new programs; don't seek assistance. We can stand on our own two feet. All we want is to be left alone."

There is nothing fundamentally changed in that message today. I think it really represents their feelings, and, yet, this should not suggest that they have no problems. You have heard the other witnesses describe the problems confronting small business, as well as some of the opportunities to ameliorate business conditions through initiatives that you might consider.

Let me comment on some options that could prove useful. I think it is important that you look at a jobs tax credit proposal. While I know that you could report legislation in the labor field, which is the responsibility of the Senate Labor and Human Resources Committee, you still can raise the consciousness level of the Senate and be a catalyst for action. Our nation's own unemployment problem is an enormous one, and I am convinced that the small business community will create permanent jobs that will get people back to work.

We can expedite that process with a jobs tax credit proposal modeled after the jobs tax credit in Public Law 95-30. I am hoping that a Committee member will seize the initiative and conduct a hearing so that the small business community can give you facts and statistics proving the desirability of a jobs tax credit bill. I recall that I was starting my law firm when the first small business jobs tax credit was passed. In my case, I was encouraged to add a new secretary to staff. The law had appropriate safeguards. No credit could be taken unless a firm's wage base increased. Therefore, it didn't allow job churning, only job creation.

Job training has been mentioned time and time again this morning, and it is a critical issue. We are entering a new era with new technology, requiring new skills. It is truly the era of a "third wave" that Toffler spoke about in his book.

Small businesses will need new training programs. I commend to you an article on this subject written by a distinguished former member of this Committee, Senator Jacob Javits, in The Washington Post (February 14, 1983). He advocates upgrading educational skills by giving a training option to the unemployed. Job training is worth a hard look, but any of these new training programs must not have an adverse revenue impact. I really think that you must remember that for small business the alarming federal deficits are now the critical issues. Small businessmen are worried about whether our economic recovery can be sustained, and they fear that it will not be sustained if the budget is not revised to reduce federal deficits.

One last comment, and it demonstrates how this Committee might focus on a particular small business problem. For example, truth-in-lending laws have produced so many cumbersome regulations that most retailers have abandoned their own credit plans in favor of bank credit cards. The virtual monopolies that bank cards now have can lead to abuses.

Here is a promotional brochure send out by a VISA card bank offering 14K gold chains and bracelets. This is pretty formidable competition when you consider that the bank, through its computers, can screen customers to whom this promotion is sent and determine, through access to computer records, who is buying jewelry or other luxury items.

What an advantage this can be to the bank merchandisers. Our retailers have complained that they are at the mercy of these new bank promotions. We shudder to think what merchandising will be like when large retailers begin to offer bank services as they are today.

We think that this is an appropriate issue for the Committee to investigate. We stand ready to assist. As I said at the outset, there is not a better forum to hear the issue than right here before the Senate Small Business Committee.

I look forward to the opportunity to work with you. Thank you very much.

STATEMENT OF LOUIS MIRMAN, PRESIDENT
NATIONAL SOCIETY OF PUBLIC ACCOUNTANTS
BEFORE THE
COMMITTEE ON SMALL BUSINESS
UNITED STATES SENATE
February 25, 1983

The National Society of Public Accountants appreciates this opportunity to appear before the Senate Committee on Small Business and to present our views regarding legislative priorities for the 98th Congress on behalf of our small business clients.

The National Society of Public Accountants is an individual membership society consisting of 17,000 independent practicing accountants. We estimate that our membership provides accounting, tax, and management advisory services to more than four million small businesses and small government entities. We have an affiliated state organization in each state, the District of Columbia and the Commonwealth of Puerto Rico.

Our most urgent legislative priority concerns the ability of many of our members to serve their clients, particularly small government entities, including Indian Tribal governments. Under guidelines issued by the General Accounting Office (Policy Memorandum B-148144) which every executive agency has been compelled to adopt by regulation, only certified public accountants or public accountants licensed before December 31, 1970 are eligible to conduct a financial audit of a federal financial assistance program. Twelve thousand Public Accountants - licensed or registered by their respective states after 1970 - are, in effect, "disbarred" under the GAO guidelines. Yet, those 12,000 licensed Public Accountants, qualified and competent as accountants under their state laws, are unable to serve their small business clients because of the arbitrary and discriminatory GAO guideline. As a result, small business clients and Indian tribal governments must seek and pay for the more expensive services of a CPA, and are denied the accountant of their choice. The GAO guideline constitutes a harsh economic boycott against the 12,000 Public Accountants licensed after 1970.

States which license public accountants have equivalency laws which provide that whenever the state law requires an audit or report to be prepared by a certified public accountant, such audits or reports may also be prepared by a public accountant licensed by the state. In other words, there is a legal equivalency provided in the law between CPAs and licensed PAs. The GAO has declined to recognize that equivalency and, in fact, has preempted state law by its arbitrary guideline in not recognizing the competency of post-1970 state licensed public accountants.

It is the intention of the National Society to seek a federal equivalency statute which will do for federal agencies what the state equivalency statute does for state agencies. This is a matter of the highest priority for those 12,000 public accountants licensed since 1970, who are small business people themselves, serving small business. When the equivalency bill we seek is introduced into the Senate - and we are confident that it will be - I trust that we can appeal to the Committee's sense of fair play. No conscientious legislator should continue to tolerate an economic boycott of an important segment of his or her constituency that is striving to maintain the viability of small business and small government entities in our American economy.

In the time remaining to me, I can only outline several other items for the Committee's attention.

We believe the authority of the Federal Trade Commission over professionals should definitely NOT be curtailed. The National Society is greatly concerned that any curtailment of the FTC's jurisdiction over professions is contrary to the best interests of the consumer of professional services. The National Society of Public Accountants supports the right of the FTC to exercise its authority to regulate and investigate the activities of professionals regulated by the various states because we as a professional society recognize the

benefit of such regulation to the consumer of those services.

By passing the Regulatory Flexibility Act, the Congress established the principle that small businesses are different. In our judgment, the Small Business Administration's Office of Advocacy has done a magnificent job in its statutory oversight role under that Act. However, some confusion still exists as to whether certain agencies - namely, the Internal Revenue Service and the Department of Defense - are subject to Reg Flex rules. In the 97th Congress, S. 2170 was introduced to eliminate any dispute about whether the Regulatory Flexibility Act covered actions and rulings of any agency. While we believe that the Congress intended that Reg Flex rules should cover such agencies, an amendment similar to S. 2170 would help to confirm that intent. Accordingly, the National Society would express the hope that the Regulatory Flexibility Act might be amended to remove any ambiguity regarding the agencies subject to the Act, or the authority of the Office of Advocacy to fulfill its oversight responsibilities.

In general, small business has expressed dissatisfaction with the position of this Administration in enforcement of the anti-trust laws and provisions of the Robinson-Patman Act. The Department of Justice has apparently set a low priority for the enforcement of Robinson-Patman. While we are cognizant of budget priorities, we cannot refrain from expressing the view that legislation or perhaps other persuasive measures by the Small Business Committee may be needed to pressure the Department to enforce the law.

The most onerous tax on small business is the payroll tax which supports our social security system. It seems to me that by virtue of the acceleration of the social security taxes, the social security system is being carried on the backs of small business. As you know, the majority of the employers in our economy are the 13 millions of small businesses, and they cannot shift their employment taxes either forward or backward. I am concerned

that an increase in employment taxes will result in less workers being employed by small business. In my judgment, the system could be rescued by downward adjustments to the COLA benefits which have increased since 1972 beyond any recipients' reasonable expectations. In this regard, I believe that cost-of-living adjustments should be limited to a percentage of the cost-of-living increase. If cost-of-living benefits were indexed to a maximum of four percent and a minimum of two percent of the cost of living increase, I seriously question whether either an acceleration in payroll taxes or additional payroll taxes would be necessary.

I am grateful to the Committee for making this opportunity available to express the views of the National Society of Public Accountants. If you have questions for me, I shall be pleased to respond.

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Testimony of Dallas E. Smith
Partner in Charge
Private Business Advisory Services

PEAT, MARWICK, MITCHELL & CO.

Before the Senate Small Business Committee

February 25, 1983

Mr. Chairman, members of the committee, and staff, my name is Dallas E. Smith. I am a partner in the international professional accounting firm of Peat Marwick and am responsible for the Firm's Private Business Advisory Services Practice. This practice directs its attention to the varied and distinct needs of small and medium-sized growth-oriented business. The Private Business Advisory Services Practice is sponsoring a three-phase, national opinion study to determine the extent and nature of the problems facing the owners and managers of small businesses and to learn how we can help solve these problems.

This study was designed and is being conducted by a team of three accounting professors from two Southern California universities. With me today to represent that team is Jerry L. Arnold, Associate Professor of Accounting at the University of Southern California. His colleagues are Michael A. Diamond, Professor of Accounting at California State University

at Los Angeles, and Alan A. Cherry, Assistant Professor of Accounting at the University of Southern California.

We are pleased to have an opportunity to appear before you today to brief you on the study. We trust that when it is finally completed, it will provide you with important findings which will contribute to your legislative agenda. For example, the first phase of the study, which was completed last spring, showed that small business management is more concerned with the day-to-day operations of running a company than with planning for the future and providing needed capital for that future. Clearly, this finding may help explain why so many small and medium-sized businesses fail when they reach a critical growth point. It also identifies a strong need for management advisory services in these areas.

We believe that small and medium-sized businesses are essential to the growth of the U. S. economy. We believe that small businesses deserve special consideration -- not only in terms of the professional services we provide, but also in terms of the environment that is created by government regulation, and government programs. Those regulations and programs in many cases designed to help small business should be compatible with the management concerns of the small businessman and woman.

My Firm has been operating for the past 85 years in this country and therefore has been witness to and part of the massive transformations in the way business is conducted. Over this period we have seen small, entrepreneurial concerns develop into giant, multinational corporations. We have seen conservative financial institutions change almost overnight by the introduction of modern marketing techniques and information and communications systems. At the same time, we have seen successful enterprises falter and ultimately fail... for their inability to recognize new trends and to adopt new methods.

But one thing has remained constant in our 85 years... and that has been our commitment to small businesses. Small business has been and remains the seed bed for growth and innovation in American business. Certainly you know the statistics better than we do about this important sector of the economy -- its contributions in terms of productivity... in terms of new jobs... in terms of research and development.

But each day our world is becoming more complex and so it is becoming increasingly difficult for these businesses not only to grow and prosper...but merely to cope. We need the kinds of professional and

management services that will aid this process. It is important that policymakers be cognizant of the management assistance needed by small business. It is equally important that Congress in its oversight of the Small Business Administration focus on this need.

We believe the findings that Professor Arnold will outline for you now will put us on a path to understanding and serving these needs better.

Testimony of Jerry L. Arnold
Associate Professor, School of Accounting

UNIVERSITY OF SOUTHERN CALIFORNIA

Before the Senate Small Business Committee

February 25, 1983

The first phase of our study was designed to learn what the owners and managers of small businesses believe are their most critical management needs. (A copy of our report on Phase I of this study is attached.)

Quite frankly, we were surprised by some of the initial findings. Specifically, we expected to find that the respondents would be more concerned than they were with raising capital. Altogether, we received responses to questionnaires from 430 owners and managers of small businesses. These respondents placed financing alternatives next to the bottom in a list of 17 critical management needs. In the past, a great deal of attention has been focused on the financing problems of small businesses, and yet these results suggest that concern may well be exaggerated.

The second significant finding involves the high degree of importance which owners and managers of small businesses assigned to solving day-to-day problems.

The highest of these, viewed as very critical by 61 percent of small business managers, is cash management. The second highest ranking -- 55 percent -- went to internal control systems, and the third highest -- with 53 percent -- went to strategies for pricing. On the other hand, only 26 percent of small business owners and managers cited long-range planning as a major concern. It ranked ninth on a list of 17.

In today's economic environment, effective planning may mean the difference between survival and bankruptcy for many small businesses. In many cases the owners and managers of small businesses are caught up in the day-to-day demands of their business. Until they can free some time to plan for the future, much of their energy will continue to be devoted to addressing immediate crises at the expense of a well planned future.

While these results are important in and of themselves, they also serve as the foundation for the second and third phases of the study. The second phase is now in progress; we are distributing questionnaires to more than 4,000 owners and managers of private companies to learn how they view the professional services that are provided to their companies. From the second phase we hope to learn which professional groups are providing services to meet the specific needs of private companies and how satisfied the recipients are with these services. We also hope to learn how professional services are selected and what can be done to improve the level of service provided.

Specifically we will look at bankers, outside accountants, independent consulting firms, attorneys and secured lenders, as well as internal management. We expect to have a report on the second phase by summer.

Our third phase will concentrate on the providers of these services to ascertain their reactions to the findings of Phase II. We believe the information should be useful to all parties interested in helping to solve the problems faced by small and medium-sized businesses, and we hope the findings will lead to improved service

Already we have confirmed that small, emerging businesses are faced with extreme day-to-day pressures just to survive and that they appear to be limited in their capability to plan for the future. Obviously an area where outside groups can take a positive and active role is by providing strategic and long-range planning.

We appreciate the opportunity to come before you today and look forward to the opportunity to share the results of future phases with you.

Thank you.

**A STUDY OF THE
NEEDS OF PRIVATE COMPANIES:
A REPORT ON PHASE ONE**

by

**Jerry L. Arnold
University of Southern California**

**Michael A. Diamond
California State University, Los Angeles**

**Alan A. Cherry
University of Southern California**

Sponsored by

**Peat, Marwick, Mitchell & Co.
Private Business Advisory Services**

In today's economic environment, there is an increasing sensitivity by professional groups to the special needs of private businesses. In this vein, we undertook this research project under the sponsorship of Peat, Marwick, Mitchell & Co. to determine: 1) the most important management needs facing private companies and how they differ, if at all, from those facing public companies; 2) which professional groups are meeting these needs; 3) how well these needs are being met by the various groups; and 4) what to expect in the future.

In this report, we will describe the most relevant findings from the first phase of the project. That is, we will discuss the most important management needs identified by private companies, and how they differ from those cited by public companies. In addition, we will discuss both the implications of these findings and the questions that they raise. The questions will serve as a basis for phase two of the study.

Determining Management Needs

In order to determine the most pressing management needs facing both private and public companies, national samples of executives from both of these groups were drawn from a cross-section of fourteen industries, as listed in Table 1, Appendix I. The firms sampled are located within both large and small cities. In all, 430 responses were received from private companies and 75 from public companies.

The participants were each asked to evaluate on a five-point scale 17 management needs identified in an earlier part of this study. In Table 2, we present the rankings of the management needs based upon their responses. These needs are listed in their order of importance. The table also presents the means of each of these variables. The findings are considered both in terms of rankings within a group (e.g., private companies) and as compared across groups (private vs. public).

Highest Ranked Needs

The highest ranked four needs for each group were:

Private Companies		Public Companies	
Need	Mean	Need	Mean
Cash Management	4.39	Internal Control Systems	4.43
Pricing Strategies	4.21	Cash Management	4.42
Internal Control Systems	4.20	Planning	4.31
Cost Reduction	4.03	Pricing Strategies	4.22

In evaluating their "very critical" management needs, 61 percent of the small business managers cited cash management, 55 percent cited internal control systems, and 53 percent, pricing strategies. The executives of public companies cited internal control systems (61 percent), cash management (57 percent), and pricing strategies (50 percent).

The implications of these results are discussed below:

Internal Control. One of the most interesting aspects of these results concerns the ranking of internal control systems. Although it is not surprising that public companies consider internal control systems so important, we did not expect private companies to rank this need in the top four. For large public companies, effective management requires the maintenance of a strong internal control system. Due to diffusion of responsibility, management of these companies must assure that their policies are being carried out. In addition, the annual audit required of public companies necessitates an evaluation of the internal control system. Finally, the overall awareness of internal control for public companies was heightened by the Foreign Corrupt Practices Act of 1977 (FCPA). Thus, considering these factors, it was anticipated that executives from public companies would rate internal control as a very important need.

The high ranking by private companies was not expected. Management of private companies is generally quite centralized, and, frequently, an owner/manager is involved. Thus, responsibility is less diffused and, ostensibly, a tight internal control system is less

essential. Further, the FCPA does not apply.¹ Nonetheless, private companies rank internal control as one of their most important needs.

This finding suggests interesting implications. Perhaps it reflects an increased awareness of internal control systems in private companies as a result of the publicity surrounding the FCPA. If this is not the case, the high ranking by private companies calls into question the necessity of the FCPA, given that executives in these companies (which are not covered by the internal control aspects of the Act) recognize the importance of internal control. This conclusion would be consistent with the recent action by Congress of revising and relaxing the provisions of the Act.

In any event, the results suggest that owner/managers of private companies look to internal control to assure the safeguarding of assets and the execution of company policies. Thus, there may be a more formal management structure in private companies than previously believed. These issues will be explored in depth in the next phase of the project.

Cash Management, Pricing Strategies, and Cost Reduction. Cash management and pricing strategies are also included in the top four needs by executives from both groups. This suggests that these needs are generic for all companies. In addition, for private companies, cost reduction is the fourth need in importance and a review of Table 2 indicates that it is ranked sixth by public companies. The above results were expected. In phase two, we will investigate whether private and public companies are also satisfying these needs in a similar manner.

Compliance with Government Regulation. Interestingly, executives from both private and public companies indicated that they view complying with government

¹The internal control aspect of the law only applies to public companies. However, publicly and privately held domestic concerns and their officers, directors, employees and shareholders are prohibited from bribing foreign politicians and political parties.

regulations as more important than such areas as financing alternatives, external financial reporting, and economic forecasting. Significantly, as discussed below, private company executives consider compliance of more concern than investment planning. These findings should lend support to the efforts of those attempting to reduce the burden on business of government compliance.

Planning. The discussion up to this point has centered on those items ranked highly by both private and public companies. The difference in relative importance of planning, however, underscores a major finding of this phase of the study. The two variables that most directly influence the future operations and directions of a company are long-range planning and investment planning. As is clear from Table 2, both of these are rated substantially higher by public companies than private companies. (Long-range planning is rated third by public companies and ninth by private companies, while investment planning is rated seventh by public companies and fourteenth by private companies.) This suggests that public companies are expending relatively more effort in this area and are more future-oriented than are private companies.

These results may well be at the core of one of the major difficulties small businesses have been facing through the years. Namely, the demands on owner/managers to deal with day-to-day operations are so strong that these individuals do not have the time to plan adequately for the future. Again, this important issue will be explored in the next phase of this project.

Financing Alternatives

Of equal interest is the low ranking of financing alternatives in the list of most important needs. In fact, it was ranked sixteenth by both private and public companies. This is especially surprising for private companies. More press has been given to the problems of raising capital by private companies than almost any other need. In addition, regulators and others have suggested that raising capital is the single most important need facing private companies. However, our findings indicate that executives from private companies are not as concerned with this as with other needs. Although the variable we included in the list, financing alternatives, does not imply the same breadth as raising capital, we would expect that, if capital is a dominant concern, it would have been ranked higher than sixteenth.

This finding raises a number of important questions. Is selection among financing alternatives, in fact, not as important as many other aspects of business? Perhaps owner/managers of private companies do not face these financing decisions on a day-to-day basis, and other more immediate needs such as cash management take precedence. Further, do executives of private companies feel that there are not alternatives (to traditional debt) in raising capital? The answers to these questions, which will be addressed in phase two, could well have a profound impact on the manner in which private business is viewed and served.

Personnel

There are several variables that address the personnel function. They include employee compensation, training and retention of personnel. At least one of these variables was ranked in the top one-third of the needs by the executives from each group. Specifically, employee compensation was ranked fifth by public companies while retention of personnel was ranked fifth by private companies. (Training was ranked sixth by private companies.) The fact that different aspects of personnel were cited as more important by each group, and the nature of these differences, are surprising. One would expect that complex public companies would be more concerned with training (and possibly retention) than would private companies. Conversely, employee compensation would seemingly be a greater problem for small owner-managed businesses. Possible reasons for the actual results will be addressed in phase two.

Implications for the Next Phase

The purpose of this phase of the study was to identify the most important management needs facing private and public companies and to compare the results between the groups. These results will serve as input into the second phase of the study. In phase two, we will survey both of these groups as well as selected users of their financial statements (bankers, venture capitalists, secured lenders, and investment bankers) in order to determine: 1) why the needs were ranked as they were, 2) which professional groups serve the needs identified, 3) how well these needs are currently being served, 4) expectations about professional services in the future, and 5) possible improvements in service.

The second phase of this project should have significant implications for the role of professionals in servicing the needs of private companies. By directing attention to areas needing improvement, it might enhance the overall quality of services provided to private companies.

Appendix I
Supporting Tables

INDUSTRIES SURVEYED

Electronic Computing and Software

Retail Stores

Oil and Natural Resources

Banks and Insurance Companies

Machinery Manufacturers

Transportation

Engineering and Architectural

Communication

Hotel

Construction

Food Products - Retailers

Wholesale Food Products

Pharmaceuticals

Miscellaneous Manufacturing

MANAGEMENT NEEDS, BY RANK

Table 2

<u>Private Companies</u>		<u>Public Companies</u>	
<u>Need</u>	<u>Mean</u>	<u>Need</u>	<u>Mean</u>
1. Cash Management	4.39	Internal Control Systems	4.43
2. Pricing Strategies	4.21	Cash Management	4.42
3. Internal Control Systems	4.20	Long-Range Planning	4.31
4. Cost Reduction	4.03	Pricing Strategies	4.22
5. Retention of Personnel	3.97	Employee Compensation	4.08
6. Training of Personnel	3.75	Cost Reduction	4.07
7. Management Accounting Systems	3.73	Investment Planning	4.04
8. Employee Compensation	3.70	Retention of Personnel	4.01
9. Long-Range Planning	3.67	Compliance with Government Regulation	3.96
10. Tax Planning	3.48	Management Accounting Systems	3.94
11. Tax Preparation	3.41	Training of Personnel	3.92
12. Recruitment of Personnel	3.29	Tax Planning	3.78
13. Compliance with Government Regulation	3.16	External Financial Reporting	3.69
14. Investment Planning	3.12	Recruitment of Personnel	3.65
15. Economic Forecasting	3.07	Tax Preparation	3.50
16. Financing Alternatives	3.03	Financing Alternatives	3.49
17. External Financial Reporting	3.02	Economic Forecasting	3.42

Means based on responses on a 1-to-5 scale, with 1 representing unimportant and 5 representing very important, with 2, 3, and 4 representing points between the two extremes.

PRIVATE COMPANY MANAGEMENT NEEDSBY REVENUE SIZE

	Overall Rank	Under \$10MM* Rank	Over \$10MM* Rank
Cash Management	1	1	3
Pricing Strategies	2	2	2
Internal Control Systems	3	3	1
Cost Reduction	4	4	5
Retention of Personnel	5	5	4
Training of Personnel	6	6	9
Management Accounting Systems	7	7	6
Employee Compensation	8	8.5**	7
Long-Range Planning	9	8.5**	8
Tax Planning	10	10	11
Tax Preparation	11	11	12
Recruitment of Personnel	12	12	10
Compliance with Government Regulation	13	13	14
Investment Planning	14	14	13
Economic Forecasting	15	15	16
Financing Alternatives	16	16	17
External Financial Reporting	17	17	15

* Total responses equalled 430; 319 had revenues of less than \$10MM; 108 had revenues of more than \$10MM; 3 respondents did not provide revenue information.

** Needs received identical rankings.

PUBLIC COMPANY MANAGEMENT NEEDSBY REVENUE SIZE

	Overall Rank	Under \$448MM* Rank	Over \$448MM* Rank
Internal Control Systems	1	1	3
Cash Management	2	2	1,5**
Long-Range Planning	3	6	1,5**
Pricing Strategies	4	3,5**	4
Employee Compensation	5	5	9
Cost Reduction	6	3,5**	8
Investment Planning	7	7,5**	5
Retention of Personnel	8	9,5**	6,5**
Compliance with Government Regulation	9	11	6,5**
Management Accounting Systems	10	7	10,5**
Training of Personnel	11	9,5**	10,5**
Tax Planning	12	12,5**	12
External Financial Reporting	13	12,5**	13
Recruitment of Personnel	14	14	14,5**
Tax Preparation	15	16	14,5**
Financing Alternatives	16	15	16
Economic Forecasting	17	17	17

* Total responses equalled 75; 36 had revenues of under \$448MM; 28 had revenues of over \$448MM; 11 respondents did not provide revenue information.

** Needs received identical rankings.

PRIVATE COMPANY MANAGEMENT NEEDS
REGIONAL DIFFERENCES

The table below shows the variables for which a significant statistical difference was found. The numbers in parentheses next to the means are the ranks within each particular region.

<u>Management Need</u>	<u>East</u>	<u>West</u>	<u>Midwest</u>	<u>Southeast</u>	<u>Southwest</u>	<u>Overall</u>
Management Accounting Systems	3.46 (9)	3.96 (6)	3.64 (8)	3.59 (8)	3.60 (9)	3.73 (7)
Investment Planning	2.32 (16)	3.35 (13)	3.04 (13)	3.13 (14)	3.14 (13)	3.12 (14)
Economic Forecasting	2.04 (17)	3.28 (14)	3.04 (13)	3.10 (15)	3.05 (14)	3.07 (15)

Appendix II
Vitae of the Researchers

- 15 -

JERRY L. ARNOLD is an assistant professor of accounting at the University of Southern California, with principal teaching and research interests in financial accounting, accounting policy determination, and the accounting profession as it relates to private companies. He has previously held teaching positions at the Graduate School of Management of UCLA, the University of Michigan, and the University of Missouri. He received his B.S.B.A. and M.A. in accounting from the University of Missouri and his Ph.D. from the University of Michigan. He has published in a wide range of professional journals, including the Georgia Journal of Accounting, the Journal of the American Taxation Association, the Journal of Commercial Bank Lending, the California CPA Quarterly, and the International Journal of Accounting.

MICHAEL A. DIAMOND is a professor of accounting and chairman of the accounting department at California State University at Los Angeles. He has also taught at UCLA and Federal City College in Washington, D.C. He received his B.A. in history from the University of California at Berkeley, and his M.S. in accounting and Ph.D. in management from UCLA. He is a contributing author to Certified Management Accounting Review and Introduction to Accounting, and is presently completing contributions to the CPA Examination Review and Intermediate Accounting. He has published extensively in professional journals, and has prepared executive education courses for Northrop, McGraw Laboratories, and Peat, Marwick, Mitchell & Co.

ALAN A. CHERRY is an assistant professor of accounting at the University of Southern California, with principal teaching and research interests in financial accounting, social accounting, accounting education, and human resource accounting. He has previously held teaching positions at the University of Maryland, UCLA, and California State University at Los Angeles. He received his B.B.A. in accounting from Baruch College of the City University of New York, and his M.S. and Ph.D. from UCLA. His current research efforts include "Testing the Effects of Social Accounting Information on Decision Making and Attitudes" (unpublished dissertation), and "Accounting for Personnel Costs in CPA Firms —A Survey" (USC working paper).

STATEMENT OF

WILLIAM D. BARTH
MEMBER, COMMITTEE ON SMALL BUSINESS
AMERICAN INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS

PRESENTED TO

THE STAFF OF THE
UNITED STATES SENATE COMMITTEE ON SMALL BUSINESS

FEBRUARY 25, 1983

Mr. Chairman, Senators, and Staff -- I am William D. Barth, Director of Small Business Practice for Arthur Andersen & Co. and a member of the Committee on Small Business of the American Institute of Certified Public Accountants. With me today are William R. Stromsen, Manager, Federal Tax Division of AICPA. We sincerely appreciate the opportunity to express our views as to the Small Business Committee agenda for this 98th Congress.

As you know, the American Institute of Certified Public Accountants is a national professional organization consisting of approximately 195,000 CPAs. The majority (52%) are in the public practice of accounting and 38% are employed with business and industry. Of the remainder, 3% work in government, another 3% in education and 4% are retired.

The Institute, through the efforts of volunteers working within 160 committees, subcommittees and boards, is devoted to organizing the body of accounting knowledge, conducting research, and establishing and enforcing the profession's technical and ethical standards along lines that serve the broad public interest.

Accordingly, we monitor proposed Federal legislation and regulations that have the potential to affect tax, accounting and auditing issues. AICPA representatives are frequently invited to participate in hearings and less formal meetings to provide testimony, assistance or opinions. Our relationship with the Congress and the Federal regulatory agencies is further

evidenced by the numerous requests for AICPA research, studies and policy papers.

Your Committee has, for many years, been a leading voice of small business in this country. Your efforts in bringing about the nation's first White House Conference on Small Business are widely recognized. The full Senate has given the Committee a vote of confidence again this year by increasing its membership, from 17 to 19.

The concerns of the accounting profession for small business, like the concerns of your Committee, are not new. In number, most clients of CPA firms are small businessmen. Indeed, many of our members in public practice are themselves in small businesses. We have included below a table summarizing the firm affiliation of the 52% of our members in public practice, as of July 31, 1982:

<u>Firm Size*</u>	<u>Number of Firms</u>	<u>Number of Members</u>
1 only	23,277	23,277
2-5	8,608	24,133
6-10	1,386	10,204
11-25	606	9,198
26-50	89	3,002
51-100	14	922
More than 100	24	27,702
	-----	-----
	34,004	98,438

*Firm size represents number of AICPA members in the firm as owner, partner or professional staff member.

The AICPA is gratified with the progress that has occurred in small business legislation in the past ten years. However, we remain very concerned about the legislative and

regulatory complexities that confront small business today. There are still certain aspects of Federal taxation and economic regulation which have the effect of discouraging the establishment of small businesses and impeding their growth, successful operation and continuation.

Instead of presenting to you a laundry list of all the specific items that concern us, I plan to focus on three major areas to which two AICPA bodies--the Small Business Committee and the Small Business Subcommittee of the Tax Division--have devoted much attention in recent months. We are convinced that significant improvements in these areas would contribute importantly to an improved environment.

SMALL BUSINESS TAX EQUITY CONFERENCE

Last autumn, the Institute sponsored its first Washington Conference on Small Business issues. We invited a number of Congressional and executive branch representatives to this "Small Business Tax Equity Conference."

Our principal objectives were to call attention to significant aspects of our Federal tax system that discriminate against small business and to develop constructive alternatives.

Our premise was not that the government has consciously discriminated against small business. Instead it was, first, that there are some important business tax provisions -- most of which were designed to provide justifiable incentives to certain courses of action -- that inadvertently give large corporations a

competitive advantage over the small businessman; and second, that there are certain inherent characteristics of small businesses that make it impractical for them to take advantage of tax benefits that are readily available to larger corporations.

A small business is typically labor intensive, closely held and owner-managed. It lacks access to outside sources of capital. Many small businesses are unincorporated. For most, the sophisticated strategies to take full advantage of potential tax savings are just not practicable, due in part to the inordinate complexity of many tax provisions.

The Conference focused on three major subjects -- job formation through small business incentives; financing the enterprise; and retirement and fringe benefits equity. Papers on specific subjects within each of these subjects were presented and discussed by Conference registrants. This spring, we shall publish the Proceedings of the Small Business Tax Equity Conference, which we can make available to you. I am confident that you will then agree that there are many structural changes that could and should be made to our Federal tax system. The changes proposed would not adversely effect any facet of the American economy nor would they significantly reduce tax revenues.

SUBCONTRACTING ON GOVERNMENT CONTRACTS

Public Law 95-507, "Government Procurement from Small and Small Disadvantaged Businesses," establishes the policy that

small business enterprises shall have the maximum practicable opportunity to participate in the performance of Federal contracts, and sets forth certain subcontracting requirements. We understand that the Ranking Minority Member and Chairman of this Committee, Sen. Nunn and Sen. Weicker, were instrumental in the formulation of this legislation. We recently expressed to the Honorable James C. Sanders, the Administrator of the U.S. Small Business Administration, our concern that P.L. 95-507's subcontracting provisions have not been fully implemented. We offered our services in helping to achieve an effective implementation of the provisions. SBA shares this concern, and we look forward to working with them on this.

Some knowledgeable observers, however, are convinced that a significant amount of small business subcontracting will never be attained unless the legislation is strengthened. An approach which we commend to your attention would be for the government to provide financial incentives to the prime contractors. The incentives may take various forms, such as having payment of a portion of the contract amount depend upon a showing by the prime contractors of efforts in good faith in the subcontract area. We recognize that there may be other solutions. My purpose today is not to recommend a specific solution, but rather to point to the desirability of effective legislative action and oversight in order to assure that small business will have a reasonable share of Federal procurements.

SMALL BUSINESS CAPITAL FORMATION

Small business financing involves two aspects--equity capital to enable the establishment and expansion of small businesses and the availability of loans. Both are important. Today, however, I shall focus briefly on the availability of bank loans at reasonable interest rates.

Even though interest rates, and particularly real interest rates, are still high in relation to historical norms, they have declined significantly in recent months. The realization that interest rates are coming down has had a great psychological effect upon the owners of small businesses as they perceive this as a sign of an emerging recovery. However, there is reason to question whether small business has fully shared the benefits of falling interest rates.

An attachment to this statement, Exhibit A, sets forth Federal Reserve System data for weighted average bank lending rates for short-term commercial and industrial loans during the period August 1980 to August 1982. Of particular interest are the rates reported as of August 1982 for all banks. The spread between interest charges on small loans compared with loans in excess of \$1,000,000 is about 5-1/2 percentage points. The Secretary of the Treasury made recent reference to such a spread as to consumer loans. For small business loans also, this phenomenon has suddenly emerged over the past few months and deserves your close attention.

Other factors also are tending to make bank loans less available to small businesses than they should be.

We refer specifically to the continuing decline of small and local banks. Smaller banks provide approximately three-fourths of all commercial loans to small business. Traditionally, the smaller bank, knowing the character and history of its customers, typically honors its close working relationship with them.

The recent trend towards consolidation within the banking industry jeopardizes this relationship. As local banks become branches or subsidiaries of larger organizations, they tend to put greater emphasis on achieving the maximum return on their lendable funds, often to the detriment of businesses in the communities which provide those funds.

Aggravating this tendency is the frequent practice of large banking organizations to rotate their personnel, interrupting long standing personal relationships. Lending decisions are based more than ever on documentary evidence of financial stability, and less on the customers' integrity and reputation within the community, and on the bank's interest in and obligation to the community. Another factor that tends to diminish banks' interest in lending to small businesses is the convenience and high return available from financial center certificates of deposit and other money market instruments.

A Special Report of the National Association of Securities Dealers on Small Business Financing developed for presentation to this Committee May 22, 1979, states:

"...it appears to be a foregone conclusion that smaller companies will face even more difficult times in the years ahead in seeking to finance normal growth, modernization and expansion."

We cannot propose a specific solution to these problems that are diminishing the funds available for loans to small businesses. Nevertheless, we think it is clear that they have had a visibly detrimental effect on small business, and if allowed to continue unabated, this trend may reach crisis proportions.

Our committee applauds the efforts of Senator Weicker, the original author of the SBPD legislation as well as past co-sponsors: Senators Baucus, Hatch, Heinz, Hollings and others who have taken the lead in proposing action on the Small Business Participating Debenture concept. When the first SBPD bill was introduced in 1979 we were told that the concept was too new and too complex to be fully understood. It was then most difficult to enlist enthusiasm for the new security as so many were unfamiliar with the proposal.

Our committee wishes to emphasize that, over the ensuing years, not one legislator has come forward in opposition to the SBPD. Small business needs available, affordable capital if it is to participate in the anticipated economic recovery and provide the jobs it is capable of creating.

Small Business United has placed the SBPD legislation at the top of its priority list of 1983. The Small Business Legislative Council continues to endorse it. The National Advisory Committee of the Small Business Administration has recommended it, and the organization on whose behalf I appear today, the American Institute of Certified Public Accountants, has recommended its passage. This AICPA Small Business Committee urges that 1983 be the year of action on SBPD legislation.

* * * * *

Our committee intends to continue its efforts to identify technical and policy factors that have an adverse or beneficial effect on small business, and to develop appropriate recommendations that should help small businesses succeed.

We thank you for the opportunity to bring these matters to your attention, and we wish to assure this United States Senate Committee on Small Business that we are firmly committed to the task of assisting the small businesses that are so vital to the economy and to all of us.

EXHIBIT AInterest Rates Relative to the Prime Rate
by Size of Loan, 1980-82Weighted Average Bank Lending Rates for Short-Term Commercial and
Industrial Loans, August 1980-August 1981

Loan Size (\$1,000)	All Banks								
	8-80	11-80	2-81	5-81	8-81	11-81	2-82	5-82	8-82
1-24	13.66	15.97	19.59	19.45	20.76	20.2	18.4	18.9	17.9
25-50	13.53	15.72	19.53	19.87	21.18	19.8	18.1	18.6	17.4
51-99	13.00	16.39	19.77	19.10	21.36	19.6	17.9	18.3	17.2
100-499	12.49	15.52	20.18	19.93	21.37	19.1	17.6	17.9	16.6
500-999	12.01	15.87	20.87	19.58	21.85	18.5	17.4	17.7	15.7
Over 1 M	10.92	15.68	19.83	20.14	21.06	16.6	17.0	16.9	12.5
Prime Rate:				19.5	20.5	17.5	16.5	16.5	15.0
	Small Banks								
	8-80	11-80	2-81	5-81	8-81	11-81	2-82	5-82	8-82
	13.71	15.91	19.38	19.34	20.59	19.9	18.3	18.5	17.9
	13.62	15.60	19.19	19.71	20.96	19.1	17.8	18.6	17.2
	13.07	16.37	19.51	18.81	21.12	19.7	18.2	18.0	17.3
	12.56	15.29	19.88	19.79	21.05	19.2	17.7	17.7	16.9
	12.11	15.75	20.94	19.28	21.96	18.8	17.3	18.1	16.1
	11.38	15.54	20.27	19.45	21.21	17.9	16.8	17.0	13.8
Prime Rate:				19.5	20.5	17.5	16.5	16.5	15.0

Source: Federal Reserve, Statistical Release E.2; The State of Small Business: A Report of the President, Transmitted to the Congress, March 1982, page 119. Updated by Office of Economic Research, Small Business Administration, January 1983.



NATIONAL ASSOCIATION OF PLUMBING • HEATING • COOLING CONTRACTORS

1016 20th STREET, N.W., WASHINGTON, D.C. 20036 • (202) 331-7675

Statement to the
Committee on Small Business
United States Senate

Presented by:
Roger Peugeot, President
Roger the Plumber

on behalf of the
National Association of Plumbing-Heating-Cooling Contractors

February 25, 1983

Mr. Chairman,

My name is Roger Peugeot and I am President of Roger the Plumber of Prairie Village, Kansas. We are a small business plumbing contractor that does repair and replacement in the residential and light commercial markets. My company employs 7 plumbers and one secretary and we grossed approximately \$600,000 last year.

I am here today as a member of the Legislative Committee of the National Association of Plumbing-Heating-Cooling Contractors (NAPHCC). Accompanying me is the NAPHCC Director of Governmental Affairs Dennis Lavallee. In addition to my role in the NAPHCC, I am also an active member of our Kansas State PHCC and our local PHCC organizations.

The National Association of Plumbing-Heating-Cooling Contractors is the oldest national association in the construction industry and the largest in the plumbing-heating-cooling industry. It has approximately 6000 members. Membership comes from every state in the country and is organized through about 300 state and local affiliated associations. This industry employs 400,000 people and has receipts of 21 billion dollars.

The members of NAPHCC are small businesses and enterprises in the purest sense of the word. We are locally based and independently owned and operated in cities and towns throughout the country.

We are here today to highlight our legislative priorities for the 98th Congress and to ask that you include these as you set the Senate Small Business Committee's agenda and work plan.

Elimination of Retainage

Retainage is a practice used in construction to insure completion of a contract. Under this practice, part of the payment for completed work, frequently 10% is withheld from the contractor until the total contract has

been completed.

When the practice of retainage first began, government agencies usually dealt with a single general contractor who performed most of the work with his own employees. Agencies withheld a portion of each progress payment as leverage to ensure the work would be completed satisfactorily. Naturally, contractors included the cost of this loss of use of their money in their prices.

Today, more than half the work is subcontracted. Retainage withheld from the prime contractor is withheld by him from the subcontractor and by him from lower tier contractors.

In a survey which we took of our members last year, we found that contractors increase their bids to cover this cost. The median increase was 3% of the contract price, but more than a quarter of the people responding reported increased prices ranging from 5% to 15%. We believe such increases are also added in by prime contractors and lower tier contractors.

The problem with this practice is that the protections it provides are duplicated by the far less costly practice of performance bonds.

Most government and construction contracts are protected by a performance bond with a surety company and paid for by the contractor to insure completion. Although this too is included in the contract price, our survey reported that the median increase in bid was only 1¼%

Thus, the government and the tax payer are paying for an unnecessary layer of protection. While the government could be covered by 1¼% of the contract price for the performance bond, it's paying 240% and more of that amount for duplicate protection by withholding retainage.

Fortunately, the wisdom of the Senate saw the inequities in that. Through the leadership of Senator Weicker's sponsorship and the cosponsorship

of Senators Nunn and Huddleston of this committee as well as other Senators, the Senate passed legislation (S. 1782) in the last Congress that would eliminate retainage. We thank the Senators for your support. Unfortunately, that legislation did not clear the House before adjournment.

However, as a result of that legislation, the Office of Federal Procurement Policy is reviewing the government's policy on retainage. A new policy is expected later in the spring. Regrettably, we are not very optimistic that their new proposal will be much better than the past. Thus, we ask that you again take up this issue and pass legislation eliminating retainage on federal construction.

- Elimination loosens up cash flow and stimulates the the economy. Retainage places severe restraints on a contractor's cash flow, requiring contractors to borrow at current high interest rates.
- Elimination of retainage would free up funds for operating capital for expansion, seeking new contract opportunities, and producing new jobs.
- Elimination speeds up project completion. Retainage slows down completion of a job. When funds are withheld from a general contractor until a project is completed, he withholds from subcontractors. Particularly those subcontractors at the early stage of construction have less incentive to complete the total work since they have to wait months or years to receive retained funds.
- Elimination lowers construction costs. Since contractors must frequently borrow to cover outstanding retainages, this cost of borrowing is passed on to the construction purchaser.
- Retainage is not needed on bonded jobs. Contractors are required to post payment and performance bonds to guarantee that work is completed. Therefore, retainage is unnecessary

duplicate protection of the government's interests.

- Elimination stimulates competition. Because of restricted cash flow and frequent slow payment of retainage, contractors avoid public construction. Eliminating this barrier will stimulate their reentry into the market and produce lower costs through competitive bids.

Retainage should be eliminated and bonding should be used as the single, best source of protection.

Unfair Competition From Public Utilities

As I mentioned in my opening remarks, we are not a large company with 7 plumbers doing the repair and replacement work in what is largely middle class communities. One part of my business is the sale and installation of water heaters. Obviously, other contractors also sell and install gas water heaters, so this is a competitive market. However, I am deeply concerned that there is a growing dominance in this market by the public utility monopoly.

Years ago, Gas Service Company began selling water heaters. They have successfully sold the A.O. Smith ten year gas water heater in competition with my company and other contractors in the area. As a result of their dominance in this service area serving approximately one million people in the greater Kansas City metropolitan area, they have taken over one part of the business and threatened to dominate another.

It used to be that they sold only the ten year heater. We were not able to compete based on price since they charge less than what we can afford to do. However, I have been able to compete by offering the consumer a five year water heater at a competitive price. Recently, the Gas Service Company has entered that sector of the market as well.

My price to sell and install a five year A. O. Smith gas water was \$310.00. With that price, I would send one man out to do the work.

Gas Service Company offers the same A. O. Smith five year water heater for \$249.00. They, too, both sell and install the product. However, they send two to three people out to install the new gas water heater.

As a result of that competition, I have recently lowered my price to \$279.00, but that is as low as I can go. Meanwhile, the utility company is advertising their product in the newspapers. In notes with their utility bill, they are including a message that they sell water heaters. Furthermore, they offer to finance the cost at 9%. The only way I can finance the sale is on Master Charge at 21%.

I don't really know how they can compete at such a low price. Perhaps it's the economies of scale. However, it appears to me that they are using their gas utility monopoly and their rate payer base to subsidize their gas water heater business.

Certainly this is a problem similar to problems many of our contractors have been experiencing around the country. Even the larger contractors are finding that they are no match to the vast array of resources available to public utilities.

Public utilities can hire marketing, publicity, economic and technical experts to develop messages to the consumer. They can target efforts at particular products. The small business contractor cannot afford the overhead to develop these sophisticated marketing tools.

They can negotiate favorable prices through bulk orders directly with manufacturers. A contractor purchases products for installation from his supply house who in turn obtains them from the manufacturers.

Utility companies have direct mail access to the homes of consumers via enclosures with the regular utility bills. Small business contractors must cultivate every lead they get.

Utilities benefit from cross-subsidization by all rate payers. Small business contractors must collect all of their costs for a job from that customer. Certainly contractors are in no position to offer rebates as utilities have done.

Whether marketing through a subsidiary or directly, customer credit checks can be made readily by the utility by checking the payment record on utility bills. Such readily available credit checks are not as available to small business contractors.

Utilities frequently have financing programs at favorable interest rates for consumers. Small business contractors seldom have the capital or cash flow to provide such financing arrangements.

When utilities or their subsidiaries expand or develop new energy conservation activities, risk plays a different role. If they lose money, they still have the rate base to fall back on. A small business contractor who seeks to expand or develop new markets may find it necessary to risk the whole company with no parent operations to fall back on.

By their very nature as publicly regulated businesses, utilities are monopolies that reach into most homes and businesses in the service area. Signs and markers designate the presence of their facilities and remind us of their network. Every month, we see their bill come in. Every month, we are reminded of the names of the utilities when we write out our checks. They have an immediate advantage of name recognition.

In contrast, there are usually a number of contractors in an area.

Although they compete vigorously, few have the capability to approach the name recognition of the utility because they do not have the same opportunities for comprehensive regular contact with consumers.

The competition from utilities has come in several forms. Utilities like Gas Service Company use their own company structure. Long Island Light Company (LILCO) of New York was attempting to create a totally owned Lilco Energy Systems Subsidiary to refer customers to. In Wisconsin, utilities are seeking to form holding companies to coordinate their utility services with sales and installation.

However, regardless of the form, utility companies are attempting to use their monopoly market position and their rate payer base to compete unfairly with small businesses.

We urge the Committee to schedule oversight hearings to explore unfair utility practices and to develop solutions that restore a fair competitive balance.

Limit Liability Under Multiemployer Pension Plans

Traditionally, union employing contractors have bargained with labor over such things as contributions to pension plans. In construction, as well as some other industries, employers have grouped together in cooperation with labor to form multiemployer plans.

With the passage of the Employee Retirement Income Security Act (ERISA) in 1974 and subsequent court decisions, this traditional relationship was changed. Rather than paying in so many cents per hour into the pension trust as contributions, employers became liable for specified levels of vested benefits promised by the pension plan trustees. In some cases, this liability runs into the hundreds of thousands of dollars and thus creating a drain on

the operability or saleability of the company.

We urge Congress to return multiemployer pension plans to defined contribution plans or, at a minimum, to limit liability through limits on benefit increases until a plan is adequately funded. We joined with other groups in offering a multi-industry supported proposal H. R. 7233 in the last Congress and urge you to consider similar legislation in the 98th.

Provide Legal Basis for Improved Multiemployer Collective Bargaining

Currently, individual contractors or groups of contractors may negotiate their own separate contract with labor to the detriment of existing relationships between labor and management groups. Legislative authority is needed to certify employer bargaining units under the National Labor Relations Act. This will enable a management group to be the exclusive bargaining agent in an area just as labor is now. We urge you to consider legislation to accomplish this.

Conclusion

In conclusion, we urge you to

1. Eliminate the duplicate level of regulation on federal construction so as to provide bonding as the single best method to protect the government's interest.
2. Schedule oversight hearings to examine the unfair and anticompetitive practices of utility monopolies in competition with small businesses.
3. Limit the liability of contractors under multiemployer pension plans by requiring that plans are adequately funded before further benefits are promised.

4. Provide a legal basis for multiemployer collective bargaining.

Thank you for this opportunity to appear. We would be happy to answer any questions.



NATIONAL ASSOCIATION OF PLUMBING-HEATING-COOLING CONTRACTORS

1016 20th STREET, N.W., WASHINGTON, D.C. 20036 • (202) 331-7675

PRIORITY ISSUES

<u>Issue</u>	<u>Explanation</u>	<u>Status</u>
Unfair Competition By Public Utilities	Contractors have experienced increased competition by public utilities, using their position as a publicly regulated monopoly in the energy supply market, they are competing unfairly in the equipment sales, service and installation markets. Methods include cross-subsidization of activities with rate payer money direct mail access to homes, financing programs, use of only select contractors.	NAPHCC seeks Congressional oversight hearings. These should focus on the proper role of publicly regulated utility monopolies and their use of economic power in unregulated competitive markets.
Elimination of Retainage	Ten percent of progress payments on completed construction work is retained from contractors to ensure satisfactory project completion. This is duplicated by the requirement for a performance bond. Retainage is an unnecessary duplicate layer of protection. It deprives contractors of valuable cash flow and increases the costs of contracts to the government.	The Senate passed legislation to eliminate retainage in 1982. The House Committee conducted hearings on a similar bill. NAPHCC seeks re-introduction and passage in the new Congress.
Limit Liability Under Multiemployer Pension Plans	Previously, contractors bargained over contributions to pension plans for employees in multiemployer plans. Legislative and judicial changes now require that these plans guarantee benefits through vesting and make contractors liable for vested benefits that are not fully funded.	NAPHCC prefers legislation which returns the status quo to defined contribution plans. Construction and other industries have offered legislation which was introduced in 1982 to limit benefit increases until pension plans are adequately funded. Similar legislation will be offered in the 98th Congress.
Provide Legal Basis for improved Multi- employer Collective Bargaining	Currently, individual contractors or groups of contractors may negotiate their own separate contract with labor to the detriment of existing relationships between labor and management groups. Legislative authority is needed to certify employer bargaining units under the National Labor Relations Act.	Legislation will be considered in the 98th Congress.

Comments of

The Associated General Contractors of America

Presented to the

Select Committee on Small Business

United States Senate

February 25, 1983



AGC is:

- * More than 32,000 firms including 8,500 of America's leading general contracting firms responsible for the employment of 3,400,000-plus employees;
- * 112 chapters nationwide;
- * More than 80% of America's contract construction of commercial buildings, highways, industrial and municipal-utility facilities;
- * Over \$100 billion of construction volume annually.

The Associated General Contractors of America and its 112 Chapters nationwide is comprised of approximately 32,000 firms including more than 8,500 of the nation's leading general contracting companies that perform more than \$100 billion of construction annually. Over 90 percent of the Association's member firms are defined as small businesses, according to SBA criteria. We appreciate the opportunity to bring to your attention the interests and concerns of our members in regards to the various federal programs aimed at increasing small business participation in government contracting.

Open, unrestricted competition in federal construction procurement has served the nation's taxpayers and the small business community well. Taxpayers are assured that their tax monies are being spent in the most efficient and economic manner possible. Small businesses are assured of equal opportunity to enter the market place and compete for their fair share. Open unrestricted competition in federal construction procurement has always given these assurances. However, the small business set aside program and the 8(a) program have combined to substantially reduce open unrestricted competition in federal construction procurement.

Current government statistics reveal that a shocking 60 percent of all federal construction contracts in FY '81 and FY '82 were unavailable for open, unrestricted competition due to the SBA's set aside and 8(a) programs. Within the Department of Defense, 63 percent of all construction contracts were unavailable and within the Naval Facilities Engineering Command, a staggering 77 percent of its construction contracts in FY '81 were unavailable for open competition because of these programs.

Given the broad language of the pertinent sections of the procurement regulations which implement the Small Business Act it is not surprising that such a high percent of contracts are set aside for small businesses. For example, the Defense Acquisition Regulations, in addition to automatically setting aside all construction contracts of \$2 million or less, also requires that all other contracts be set aside if there is a reasonable expectation that offers will be received from at least two responsible small businesses and that the award will be made at a "reasonable" price. In today's market, it is not unusual for 25 or more contractors to bid on available construction contracts, and not unusual for even the highest of the 25 bids to be below the government's estimate. Given current economic conditions, these regulations could literally require that 100 percent of available contracts be set aside for small businesses. Limiting open competition in such a manner undermines the responsibility of federal agencies as fiduciary of the public funds placed in their trust. Whenever open competition is restricted there is no assurance that the taxpayer will be receiving the highest quality product for the lowest possible price.

A more glaring example of the affect of limiting competition is the 8(a) program. In this program the entire competitive procurement process is circumvented and competition is totally eliminated since contracts are awarded on a sole source negotiated basis. There is no question that this program increases costs to the government and, of course, the taxpaying public. Although there is rarely a comparison made of the negotiated 8(a) price and a competitively bid price, AGC has been able to develop some comparisons. The following four projects were negotiated with 8(a)

firms and for one reason or another were eventually competitively bid:

		SAVINGS THROUGH OPEN COMPETITIVE BIDDING:
Highway relocation, Elephant Butte, Idaho (Federal Highway Administration)	The 8(a) negotiated price was \$3,024,000; the low competitive bid was \$2,355,000	\$669,000 or 22%
Environmental Test Facility, Yuma, Arizona (Army Corps of Engineers)	The 8(a) price had been \$1,839,872; the low bid was \$1,558,884	\$280,988 or 15%
Flood wall project, Delta, Louisiana (Army Corps of Engineers)	The 8(a) price was \$416,000; the low bid was \$188,950	\$227,050 or 55%
Water supply project, Riverton, Wyoming (Bureau of Reclamation)	The 8(a) price was \$580,000; the low bid was \$353,812	\$226,188 or 39%

The total savings to the government by awarding these projects to the low bidder after open competition compared to awarding them on a sole source negotiated basis was \$1.4 billion. There is no doubt that these increased costs are indicative of the overall costs of the 8(a) program.

Not only does this program increase costs to the government and the tax-paying public, but it undermines the normal process by which firms enter the industry and remain in business. Providing a protected market for a small firm does not help it to become a competitive business but rather ensures that it will remain indefinitely in a non-competitive federal cocoon. AGC believes that the recent action by SBA to remove 23 large businesses from the 8(a) program underscores this point. The reaction of these 23 firms to the move were protests that they were poorly prepared to enter the

open competitive market. Most of these firms had been in the program for years and some since its inception and yet they were still unprepared for competition. AGC applauds this move by SBA and the recently promulgated Fixed Program Participation Terms but we feel that the entire concept as it applies to construction needs to be reexamined.

AGC believes that there is no need for any type of special preference programs in the construction industry and AGC recommends the elimination of these programs in the construction industry. The recent trend in the Congress has been to require "sunset reviews" of federal programs to determine if these programs are necessary and if they should be continued. AGC calls on this Committee to institute a "sunset review" of the use of the small business set aside and 8(a) programs in the construction industry. Such review should be instituted by a one year moratorium on the use of these programs in construction. All of the current statistic gathering mechanisms would remain in place during this period and would provide the basis for a meaningful comparison between awards to small businesses in the open competitive arena as compared to awards to small businesses in a market restricted by these special preference programs. We are convinced that such a test will show that there is no need for these programs in the construction industry.

SUGGESTIONS FOR LEGISLATIVE AGENDA

NATIONAL SMALL BUSINESS GOVERNMENT CONTRACTORS ASSOCIATION

1. Rulemaking.

The first issue of concern to our members regards procurement rulemaking. Presently, procuring agencies are exempt under the Administrative Procedure Act, 5 U.S.C. §553, from the requirement to publish proposed regulations in the Federal Register. Procuring agencies contend that since this exemption exists, they are not required to comply with the requirements of the Regulatory Flexibility Act. This Act was intended to require agencies to consider the impact on small business of their rulemaking efforts and to increase small business participation in these efforts.

We support an amendment to the Small Business Act which would require procuring agencies, notwithstanding any other law, to publish a general notice of proposed rulemaking relating to Government contracts or subcontracts. Such amendment would provide essential advance notice to small business organizations, such as NSBGCA, which would be able to review these proposed regulations, assess their impact on its constituents and provide meaningful comments to the procuring agency. Small businesses would then have the opportunity to contribute the benefit of their experience as a vital part of the entire Federal procurement process.

2. Commerce Business Daily.

The second issue of concern to NSBGCA members regards the publication of proposed procurement actions in the Commerce Business Daily. NSBGCA was pleased to see S.272, which amends the Small Business Act, voted favorably out of this Committee and passed, with some amendments, by the full Senate. It is vital to small businesses who engage in federal government contracting that this bill become law. Too often small businesses have neither received sufficient notice of the availability of procurements nor sufficient time for bid preparation. Small businesses cannot be meaningfully involved in the procurement process if they do not have notice of the proposed procurement and the time to bid. NSBGCA therefore urges that steps be taken to ensure that S.272 becomes law.

3. Technical Data in Procurement.

The Association hears a rising crescendo of complaints from small businesses that they are unable to participate in Government procurements because of problems obtaining technical data. The problem is particularly pronounced among contractors with the Department of Defense.

Our investigation shows that this is a complex issue, with many parts. Accordingly, rather than propose specific legislation at this time, we suggest that the Committee consider holding oversight hearings into the area. Such hearings should delve into the questions of what technical data and data rights the Government has in stock now and how they are accounted for; current and proposed technical dissemination policies and their impact on small businesses; technical data acquisition policies

and practices and their implications for competition in general, and small business participation in particular; and, relationships between defense prime and subcontractors in the technical data area.

4. Transfer of Procurement Functions to the Defense Logistics Agency.

There has been a recent move to shift procurement responsibility for a large variety of military spares and other items from the various military services to the Defense Logistics Agency. The immediate result of this transfer has been devastating to those small businesses affected by it; their defense business has fallen off substantially. It does not appear clear whether this is a temporary dislocation, or whether DLA has practices and procedures which are unnecessarily disadvantageous to small business.

Accordingly, the Association suggests that you consider holding oversight hearings into this transfer and its impact on small business. Such hearings could elucidate why the transfer is taking place; what future role in defense procurement is envisioned for DLA; whether DLA, which usually procures simple commercial items, is an appropriate agency to be purchasing more complex items; whether divorcing the engineering support activity from the procurement function leads to a less efficient and less competitive procurement system; whether expertise developed in the military services is being transferred to DLA effectively and efficiently, along with procurement responsibility; and whether DLA's procedures for promoting competition are adequate for its new responsibilities.

5. Size Standards.

As the Committee is aware, SBA has under consideration proposed changes to its size standards for determining small business status. The proposals have both good and bad features. On the positive side, the move from dollar-based standards to employee-based standards is a sound one, and overdue in view of inflation.

However, it appears that the negative aspects of SBA's proposals may outweigh the positive ones. Many of the standards appear to be exceeding low, unnecessarily cutting valid small businesses out of SBA programs. The Association questions whether SBA has implemented accurate and probative economic data, and has applied this data in accordance with the spirit of the Small Business Act. Moreover, the standards seem to be unnecessarily restrictive when applied to dealers, or to manufacturers acting as dealers. Finally, numerous peripheral issues need to be resolved, such as accounting for part-time employees. In summary, the Association believes that careful oversight of this matter is important.

6. Contracting Out.

A third issue of concern to small businesses providing a service to the Federal Government, as opposed to a product, are the revisions as proposed by the Office of Management and Budget to OMB Circular A-76. This circular provides the guidelines for when the Government should perform functions in-house with Government personnel or contract out to private businesses. One of the proposed revisions encourages federal agencies to combine numerous functions into one large consolidated contract rather than award

several smaller contracts for which small businesses can compete. These "umbrella" contracts will prevent small businesses from obtaining prime contract awards since such multi-million dollar awards exceed the financial capability of most small businesses.

OMB acknowledges the adverse impact this policy will have on small businesses, but by way of compensation proposes that large prime contractors subcontract to small business. What this amounts to is a set-aside for large business. Small businesses are willing and able to compete as prime contractors and desire the opportunity to do so. Umbrella contracts, as proposed by OMB, will increase the cost to the Government and exclude small business from the greatest share of available work. The advantages of this scheme are questionable and will work to the detriment of the small businesses who currently provide the Government with the services it requires.

NSBGCA is adamantly opposed to the implementation of the umbrella contract concept. Should OMB issue this revision without deleting this provision, we would urge legislation to supersede and prevent the disastrous effects this policy would have on small business.

LYDIA BARBARA BASHWINER
EXECUTIVE DIRECTOR, NSBGCA

JOSEPH J. PETRILLO
BOWMAN CONNER TOUHEY & THORNTON

TESTIMONY BY VIRGINIA LITTLEJOHN ON BEHALF OF THE NATIONAL
ASSOCIATION OF WOMEN BUSINESS OWNERS BEFORE THE SENATE SMALL
BUSINESS COMMITTEE ON FEBRUARY 25, 1983

It's a pleasure to be here today. My name is Virginia Littlejohn, President of Littlejohn Johnson, Inc., a consulting firm in Washington, DC, providing association management, fund-raising and computer software development. Today I am representing the National Association of Women Business Owners, known as NAWBO, for which I am President of the Capital Area Chapter, as well as National Public Affairs Director.

Rather than proposing or opposing specific legislation in the brief time we have today, we would like to provide a short status report on the growth of women's business enterprise, and to present some statistics which you may find of interest.

Prior to the mid 1970s, women business owners were a near-invisible constituency. This was in large part because there were no published statistics to demonstrate that we existed. At the urging of NAWBO and the National Federation of Business and Professional Women's Clubs, the Ford White House took a leadership role in instituting mechanisms to gather and analyze data on women entrepreneurs. This process accelerated under the Carter Administration, with first its Task Force, and then Interagency Committee, on Women's Business Enterprise.

There are now three sources of data concerning women-owned businesses: the Bureau of Census, Internal Revenue Service, and the Bureau of Labor Statistics. Each source uses different methodologies to arrive at their conclusions, but all show dramatic increases in the number of female entrepreneurs.

A. The Bureau of Census began collecting data on women in 1972. Between that year and the next economic census in 1977 the number of women-owned firms grew by 30% and receipts by 72%. 1982 figures are not yet available.

B. BLS data demonstrates that between 1972 and 1979 the number of self-employed women grew 43% or five times faster than self-employed men.

C. And quite recently, the IRS published Statistics on Income: Sole Proprietorships 1979-1980, indicating that the number of women sole proprietors was 2,787,038 in 1980, or 22% of all sole proprietors. This figure represents nearly a 7% increase in numbers since 1979. As sole proprietorships make up about 75% of the small business community, we can estimate the number of women-owned firms at 3.7 million in 1980, or 25% of all small businesses. While our gross annual receipts are still appreciably smaller than in male owned businesses, the trendline continues to climb impressively.

Because women-owned businesses are far and away the fastest growing segment of the small business community--the sector which provides the majority of jobs created in this country--we expect that our firms will prove to be a significant source of job creation in the years ahead as our firms become larger and increasingly profitable.

As our numbers and gross annual receipts have grown, so has the strength of our associations. NAWBO, for example, now has 17 chapters, with 7 more in formation, and we are in regular communication with several dozen other independent associations

of women business owners throughout the country. In addition, the Capital Area Chapter of NAWBO will host a national convention here in June, 1984, five months prior to the national elections, to celebrate our tenth anniversary.

Our immediate Past President, Marlene Johnson, who has testified before this committee on several occasions, has just been sworn in as Lieutenant Governor of Minnesota, and the Past President of the independent New Jersey Association of Women Business Owners, Elizabeth T. Lyons, last year was appointed by Governor Tom Kaen to head up the Small Business Office for the State of New Jersey.

In recognition of the dynamic relationship between business, politics and government, NAWBO is instituting a political action committee to support, on a bipartisan basis, candidates who are supportive of small business and entrepreneurship in general, and women's business enterprise in particular.

We have worked closely with members and staff of the Senate Small Business Committee since 1976, and we look forward to a continued close working relationship with you, and to your active support of the Women's Business Enterprise program at SBA, under the able stewardship of Carolyn Schoenberg Gray.

Thank you.

TESTIMONY OF THE
INTERNATIONAL FRANCHISE ASSOCIATION
MR. WILLIAM B. CHERKASKY, EXECUTIVE VICE PRESIDENT
SENATE COMMITTEE ON SMALL BUSINESS

FEBRUARY 25, 1983

IT IS A PLEASURE TO APPEAR BEFORE THE SENATE COMMITTEE ON SMALL BUSINESS. TODAY I APPEAR BEFORE YOU AS EXECUTIVE VICE PRESIDENT OF THE INTERNATIONAL FRANCHISE ASSOCIATION, IFA.

IFA IS THE WORLD'S OLDEST AND LARGEST TRADE ASSOCIATION REPRESENTING FRANCHISING COMPANIES. THE ONLY TRADE ASSOCIATION OF ITS KIND IN THIS COUNTRY, IFA TODAY REPRESENTS SOME 350 MEMBER COMPANIES, INCLUDING MCDONALD'S, THE COCA-COLA COMPANY, MIDAS INTERNATIONAL, RADIO SHACK, AND HOLIDAY INNS.

IFA WAS FOUNDED IN 1960 BY RESPONSIBLE LEADERS IN FRANCHISING AS A WAY OF SETTING ETHICAL STANDARDS FOR FRANCHISORS AND IMPROVING THE FRANCHISE WAY OF DOING BUSINESS. WE ARE A NONPROFIT TRADE ASSOCIATION, AND THE IFA CODE OF ETHICS • CONTINUES TO SERVE AS THE STANDARD THROUGHOUT THE UNITED STATES AND AMONG OUR MEMBER COMPANIES IN OTHER COUNTRIES. IFA IS AFFILIATED WITH ELEVEN OTHER SIMILAR ORGANIZATIONS THROUGHOUT THE FREE WORLD AND CONTINUES TO SERVE AS A WORLD LEADER, JUST AS OUR MEMBER COMPANIES LEAD THE WORLD IN FRANCHISING.

OUR INTEREST IN SMALL BUSINESS IS ON TWO DISTINCT LEVELS. FIRST, CONTRARY TO POPULAR BELIEF, MOST FRANCHISORS, THAT IS, THE PARENT COMPANIES, ARE RELATIVELY SMALL. ACCORDING TO THE DEPARTMENT OF COMMERCE'S RECENTLY PUBLISHED EDITION OF FRANCHISING IN THE ECONOMY, SOME 67.8 PERCENT OF BUSINESS FORMAT FRANCHISING COMPANIES HAVE 50 OR FEWER ESTABLISHMENTS IN THEIR CHAINS, MOST OF THESE ESTABLISHMENTS BEING OWNED BY THEIR FRANCHISEES. SECOND, AND MORE IMPORTANTLY, WE ARE INTERESTED IN THE FRANCHISEES AND THEIR ESTABLISHMENTS. THE COMMERCE DEPARTMENT REPORTS THAT AT YEAR END 1981, THERE WERE 356,513 FRANCHISEE-OWNED ESTABLISHMENTS IN THE UNITED STATES, AND PROJECTS THAT BY YEAR END 1983, THERE WILL BE ANOTHER 19,814 OF THEM. THAT REPRESENTS A PROJECTED GROWTH RATE OF 5.1 PERCENT IN THE NUMBER OF ESTABLISHMENTS OVER A TWO-YEAR PERIOD. IN THE SAME TIME FRAME THERE IS A PROJECTED RETAIL SALES INCREASE OF 19.5 PERCENT. SALES FOR ALL OF FRANCHISING IN THE U.S. ARE PROJECTED AT NEARLY \$435 BILLION, SOME \$375 BILLION OF THAT COMING THROUGH FRANCHISEE-OWNED ESTABLISHMENTS.

IN OUR CURRENT ECONOMY, WITH UNEMPLOYMENT BEING THE MAJOR PROBLEM THAT IT IS, IT IS IMPORTANT TO NOTE THAT IN 1981, MORE THAN 210,000 NET NEW JOBS WERE ADDED IN THE FRANCHISE SYSTEM. THE RETAIL SECTOR OF OUR ECONOMY IS LABOR INTENSIVE, AND FRANCHISING IS PREDOMINATELY RETAIL, ACCOUNTING FOR AN ESTIMATED ONE-THIRD OF ALL RETAIL SALES IN 1983. FRANCHISING IS EXPECTED TO EMPLOY

MORE THAN 5.2 MILLION PEOPLE BY THE END OF 1983, REPRESENTING A NET INCREASE OF ABOUT 6.6 PERCENT OVER TWO OF THE WORST EMPLOYMENT YEARS IN RECENT MEMORY.

THE PROPORTIONS OF THESE NUMBERS CLEARLY DEMONSTRATE THE IMPORTANCE AND POSITION OF FRANCHISING IN THE U.S. ECONOMY. SINCE FRANCHISING ITSELF IS NOT AN INDUSTRY BUT A METHOD OF MARKETING GOODS AND SERVICES IN MORE THAN 40 INDUSTRIES, FRANCHISING HAS CONSIDERABLE GROWTH POTENTIAL OVER THE NEXT DECADE AND BEYOND. MORE IMPORTANTLY, FRANCHISING HAS PROVEN ITSELF TO BE A SUCCESSFUL METHOD OF GROWTH. A CONGRESSIONAL COMMITTEE REPORT LAST YEAR ESTIMATED "AN AVERAGE FAILURE RANGE OF 2 TO 6 PERCENT FOR ALL FRANCHISES." COMMERCE DEPARTMENT RECORDS OVER THE PAST DECADE INDICATE THAT LESS THAN 5 PERCENT OF FRANCHISEE-OWNED OUTLETS WERE DISCONTINUED IN ANY GIVEN YEAR, MANY OF THEM FOR REASONS OTHER THAN BUSINESS FAILURE. A 1980 POLL OF OUR MEMBER COMPANIES SHOWS THAT FOR THE TWO PREVIOUS YEARS, ONLY ABOUT SEVEN-TENTHS OF ONE PERCENT OF FRANCHISEE-OWNED OUTLETS CLOSED AS A RESULT OF BUSINESS FAILURE IN EITHER YEAR.

GIVEN THE RECOGNIZED SUCCESS OF FRANCHISING IN OUR ECONOMY, THERE ARE THREE AREAS OF CONCERN THAT I WOULD LIKE TO ADDRESS THIS MORNING.

AS IFA HAS TESTIFIED IN THE PAST ON BEHALF OF NOT ONLY OUR MEMBER COMPANIES BUT ALSO THOUSANDS OF SMALL BUSINESS PEOPLE WHO OWN FRANCHISES AND THOSE WHO WANT TO PURCHASE THEM TO MAKE A BETTER LIFE FOR THEMSELVES AND THEIR FAMILIES, WE ARE CONCERNED ABOUT THE PROPOSED CHANGES IN THE SIZE STANDARDS USED BY THE SMALL BUSINESS ADMINISTRATION TO DETERMINE WHICH SMALL BUSINESS PEOPLE ARE ELIGIBLE FOR GOVERNMENT ASSISTANCE THROUGH THE SBA. AS WE HAVE ALREADY TESTIFIED AT LENGTH ON THAT ISSUE, I WILL NOT BELABOR IT HERE. OUR ONLY CONCERN IS THAT THE SIZE STANDARDS THAT ARE EVENTUALLY ISSUED ARE NOT ARBITRARY, BUT ARE FAIR, EQUITABLE, AND CONDUCIVE TO FULFILLING THE GROWTH POTENTIAL EVIDENT IN FRANCHISING. WE WOULD EXPECT THAT OUR OUTLINED OBJECTIVES AND THOSE OF THE NATIONAL SMALL BUSINESS ACT ARE SATISFIED.

SECONDLY, AS WE HAVE TESTIFIED BEFORE THE HOUSE COMMITTEE ON GOVERNMENT OPERATIONS LAST YEAR, WE ARE VITALLY INTERESTED IN ASSURING THAT SBA ASSISTANCE, IN THE FORM OF DIRECT AND GUARANTEED LOANS, CONTINUES TO BE AVAILABLE TO PROVIDE ENTRY AND GROWTH OPPORTUNITIES FOR PRESENT AND FUTURE FRANCHISEES. WE WOULD EXPECT THE SBA TO TAKE A MORE FAVORABLE VIEW ON FRANCHISING IN THE FUTURE--A VIEW BASED ON THE FACTS. TO THAT END, WE HAVE RECOMMENDED THAT SBA DEVELOP A CENTRAL SOURCE OF FRANCHISE INFORMATION, AND WE WOULD HOPE THAT SBA WOULD MAINTAIN BETTER STATISTICAL DATA ON ALL OF SMALL BUSINESS. IT IS ASTONISHING

THAT TODAY SBA HAS LITTLE SOLID INFORMATION ON THE NUMBER AND TYPES OF COMPANIES ENTERING AND LEAVING SMALL BUSINESS AND THE REASONS FOR IT. THE LAST COMPREHENSIVE STUDY OF BUSINESS MORTALITY RATES WAS COMPLETED BY THE COMMERCE DEPARTMENT IN 1954. AS WE TESTIFIED PREVIOUSLY, FRANCHISORS SHOULD NOT BE REQUIRED TO PARTICIPATE IN LOANS OR GUARANTEE THEM. IN MOST CASES, FRANCHISORS ARE ALREADY PUTTING UP SUBSTANTIAL AMOUNTS OF CAPITAL SIMPLY TO HELP SET THE FRANCHISEE UP IN A PROVEN, SUCCESSFUL BUSINESS. FURTHERMORE, SBA SHOULD NOT BE ENTITLED TO REQUIRE MODIFICATION OF FRANCHISE AGREEMENTS. AND SBA DISTRICT OFFICES SHOULD, UNDER APPROPRIATE CIRCUMSTANCES, BE ENTITLED TO MAKE OR GUARANTEE LOANS OUTSIDE THEIR DISTRICTS.

THIRD, AND FINALLY, WE WOULD URGE THE COMMITTEE TO DEREGULATE AND THEREBY LIFT EXISTING BURDENS ON THE BELEAGUERED SMALL BUSINESS COMMUNITY AND CONTINUE TO SERVE AS A WATCHDOG OVER THE INTERESTS OF THAT SECTOR OF THE ECONOMY THAT IS AMERICA'S ONLY REAL HOPE FOR FUTURE JOB CREATION AND PROSPERITY.

THANK YOU FOR YOUR ATTENTION.

TESTIMONY OF THE NATIONAL ASSOCIATION OF
WOMEN GOVERNMENT CONTRACTORS (NAWGC) BEFORE THE
SENATE SMALL BUSINESS COMMITTEE...25 FEBRUARY 1983

My name is Paralee White. I am Vice-President of the National Association of Women Government Contractors, an organization resulting from the merger of the Association of Women Government Contractors (AWGC) and the National Association of Women Federal Contractors (NAWFC). NAWGC represents women business owners selling to federal, state, and local governments across the United States. We provide contracting information, training, and advice to members nationwide. In particular, however, NAWGC represents women business owners in continuing the over three year old struggle for equal opportunity with other disadvantaged business owners in the government marketplace. We wish to thank Senator Weicker and Senator Nunn for their kind invitation for NAWGC to assist the Senate Small Business Committee in identifying priority legislative issues for the 98th Congress. Ms. Karen Olson, woman business owner of New York and President of the NAWGC, has requested that I present the views of NAWGC today.

Our purpose in being here today is to bring to the Committee's attention 1) the lack of equal opportunity provided women business owners in selling to the Government, 2) the

flagrant violation of P.L. 95-507 and Congressional intent by the Small Business Administration (SBA) in its administration of SBA programs for disadvantaged business owners and 3) the promise of equal opportunity if the Committee directs the SBA to abide with P.L. 95-507's inclusion of women owned businesses in the 8(a) program for business owners experiencing social disadvantage.

The Law, Congressional Intent, and Statistical Studies Require That Women Owned Businesses Selling to the Government Be Included In the SBA 8(a) Program.

We attach for the Committee's reference the May 29, 1980 and February 18, 1981 testimony of the NAWFC before this Committee and the September 18, 1980 testimony of the NAWFC before the House Subcommittee on General Oversight and Minority Business Enterprise. These three presentations provide an historical, political and legal basis for including women federal contractors in the SBA's 8(a) business development program. Statistics, government reports, hearings and case studies are provided in this prior testimony.

By way of background, P.L. 95-507, the SBA's 8(a) program (commonly referred to as "8(a)") is a full service development program designed specifically to foster the growth and competitive capability of firms that are underrepresented in the free enterprise system due to past and present discriminatory practices in the marketplace. P.L. 95-507 describes those

underrepresented firms as small business owners that are both socially and economically disadvantaged. The criteria used to determine social and economic disadvantage are stated in the Act itself:

"Socially disadvantaged individuals are those who have been subject to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities." (Emphasis added.)

Thus cultural bias is a basis for finding social disadvantage and participating in the 8(a) program.

According to Congress, sex discrimination is equated with cultural bias and social disadvantage. House Committee Report 95-949 (March 13, 1978), adopted by the Conference Committee¹ regarding this legislation, states that sex discrimination must be considered as resulting in social disadvantage for purposes of 8(a) eligibility criteria. The Report stated

"...when implementing eligibility criteria creation by this Subsection (8(a)), the Committee intends that SBA give most serious consideration to, among others, women business owners. The Committee notes that sex

¹ Conference Committee Report dated April 1980, published by GPO, entitled "Printing for the Use of the Small Business Committee, 96th Congress, 2nd Session, Government Procurement for Small and Small Disadvantaged Business (95-507).

discrimination, whether overt or subtle, does result in business impediments which are not generally common to all small business owners. Further, sex discrimination, since it involves interpersonal relationships, must be considered as resulting in social disadvantage within the meaning of 8(a)."

Therefore, sex discrimination is exactly the form of prejudice intended to be encompassed by the finding of "cultural bias" and, thus, social disadvantage under the Act.

Summarized, according to P.L. 95-507 and legislative history, sex discrimination results in cultural bias. Cultural bias results in social disadvantage. Business owners experiencing social disadvantage are eligible for the SBA's 8(a) program. Women business owners, as reported by Congress itself, suffer business impediments because of the cultural bias evidenced by sex discrimination. This cultural bias is the social disadvantage mandatory for inclusion of women business owners in the 8(a) program.

SBA Refuses to Abide With P.L. 95-507 and Congressional Intent By Refusing to Recognize Sex Discrimination As Cultural Bias. Accordingly, SBA Systematically Excludes Women Business Owners From the 8(a) Program.

Under the Carter Administration, SBA summarily rejected 8(a) applications by women business owners who could only

demonstrate cultural bias in the form of sex discrimination--that is, who did not automatically pass the social disadvantage test because of being members of presumed disadvantaged minority groups. SBA claimed that "SBA does not equate sex discrimination with cultural bias." An example of this standard rejection language, still in use by the SBA, in a letter rejecting an 8(a) application by the then-Associate Administrator for Minority Small Business, is included as Attachment 1.

What has this meant in lost opportunities for women business owners? The 8(a) program contracts for many millions of dollars of goods and services from disadvantaged firms. Women business owners do not benefit from this buying program. As of August 1981 (from SBA's own data delivered to the Assistant to the President for Policy Development), 2,264 small businesses had received 8(a) certification. Of these, only 7 women business owners were admitted based on social disadvantage under the cultural bias test alone (89 minority women business owners were admitted based on ethnicity). These 7 women business owners all had to retain counsel at considerable personal expense, and a number had to bring suit, before SBA agreed to recognize that the sex discrimination they had shown they had experienced in developing their businesses was a form of cultural bias.

SBA is clearly violating P.L. 95-507 and Congressional intent by refusing to recognize women business owners as socially disadvantaged under the cultural bias criteria. Congress

specifically identified sex discrimination as resulting in cultural bias. Having suffered cultural bias, women business owners must be admitted to the program as a matter of law. NAWGC requests that the Committee direct SBA:

1. To formally determine that "cultural bias" in P.L. 95-507 covers all forms of discrimination cited in the Civil Rights Act of 1964, most particularly sex discrimination;
2. To formally determine that sex discrimination is a form of cultural bias and results in social disadvantage to those discriminated against, and;
3. To formally determine administrative that women federal contractors, as a group, are socially disadvantaged.

The Carter Administration's Programs Still in Place At SBA Are Useless in Eliminating Social Disadvantage

Both the National Association of Women Federal Contractors and the Association of Women Government Contractors were formed at the 1980 White House Conference on Small Business. Both trade associations were formed to speak for that minority of women-owned businesses that sell, or seek to sell, to the federal government ("women federal contractors"). At the 1980 Conference, the general business trade groups did not understand that the massive regulation government the federal procurement process provided only two ways for government procurement officials to actively achieve goals for disadvantaged business

groups selling to the government: through "small business set-asides" (limited to competition among small businesses) and through "8(a) set-asides (either sole source or limited competition to disadvantaged, small businesses only). Because the import of the procurement regulations was not appreciated, the leaders endorsed President Carter's Executive Order 12138, which, while defining the entity "women-owned businesses" and setting goals for purchase of goods and services by the federal government from women-owned businesses, did not provide the legal means to make such purchases from women-owned businesses. Procurement officials refer to Executive Order 12138 as "window dressing".

An Associate Administrator for Women's Business Enterprise in the SBA also was established. The Associate Administrator position has disappeared.

Today women business owners have no mechanism for overcoming the social disadvantages experienced by women business owners attempting to sell to the Government. The SBA Office of Women's Business Ownership operates a management and training outreach program. However, it is relevant only to traditional women's businesses - small boutiques, retail trade, and cottage industries. These businesses do not market products or services purchased by the Government.

There is no representation of the minority (i.e. small

percentage) of women business owners that sell to the Government. Yet the women owned businesses selling to the Government - construction, manufacturing, R&D, professional services - suffer most from the very "cultural bias", sex discrimination, and social disadvantage that Congress mandated SBA to eliminate from Government procurement.

Bureau of the Census data for 1977 indicates that women owned construction businesses were 1.9 percent of all United States construction firms. The number of women owned businesses in transportation and public utilities was equally small - 2.9 percent. Of the manufacturing firms, however, 6.6 percent were women owned. Wholesale and retail trades are 8.7 percent women-owned while selected services are 8.8 percent women-owned. Yet according to statistics from the Office of Federal Procurement Policy for FY 79 women-owned businesses received less than .2% of the Federal procurement dollar. The average size of procurements from women was about \$60,000 compared to \$250,000 from other businesses.²

We do not believe that those women owned businesses do not want to sell to the Government. They do--and they want to make money doing it. However, to do so successfully the

² The lack of data on women-owned businesses selling to the Government again results from an apparent lack of interest by SBA. Although directed by Congress to collect such data pursuant to 95-507, SBA has yet to establish a meaningful data collection mechanism.

traditional roadblocks to women-owned businesses must be removed. The NAWGC mission is to have women federal contractors, as a group, recognized as eligible for the SBA's 8(a) business development program so that they, as part of the overall disadvantaged, small business community, can receive the same fair protection that is currently afforded to racial and ethnic members.

NAWGC is not the only group of women-owned businesses aware of the problems faced by women-owned businesses selling to the Government. NAWGC's position has been supported by women-owned business groups with a more general membership including the National Association of Women Business Owners.

The Qualification of Businesses As Women Owned Businesses
(Businesses Owned and Controlled By Women) Can Be Adequately
Determined By the Existing Procedures Qualifying Businesses
Eligible On the Basis of Race or Ethnicity.

Accepting for the moment that women owned businesses selling to the Government are sexually discriminated against and suffer social disadvantage as a result, let's address one of the key issues frequently raised in any equal opportunity program - how do you insure that those suffering from the lack of equal opportunity receive the benefits of the program?

SBA has detailed procedures for determining true ownership and control of businesses applying for the 8(a)

program. Those same procedures will be applicable to women owned businesses. In addition, the state of Maryland, which considers women owned businesses as minority owned businesses has a very effective qualifying procedure. We would be extremely happy to work with SBA to insure that only women owned businesses receive the benefits of the program.

NAWGC Requests that the Committee Direct SBA to Enforce the Law and Congressional Intent.

We respectfully request that the Committee give serious consideration to the following questions:

- (a) Where in P.L. 95-507 does the Congress explicitly authorize the SBA to administer the 8(a) business development program primarily for racial and ethnic minority groups and to the exclusion of other disadvantaged groups that have been subjected to cultural bias--prejudicial behavior patterns regarded as expressing a traditional way of life--such as, for example, women federal contractors?
- (b) Where is SBA given the authority to ignore the Congressional directive that it must consider sex discrimination as resulting in social disadvantage (see Report adopted by the Conference Committee--Report 95-949, March 13, 1978)?
- (c) Where is there a better place for President Reagan to

fulfill his campaign promise to change those practices that are discriminatory to women than one that is a flagrant violation of law and Congressional intent?

We submit that there is no basis for the SBA actions and that it is acting outside its authority in so administering the 8(a) program. We submit that there is no better opportunity for President Reagan to fulfill his campaign promise than for this Committee to direct SBA to enforce the law as written by Congress.

We thank Senator Weicker and Senator Nunn for the opportunity to bring this priority issue to the attention of the Committee.

U.S. GOVERNMENT
SMALL BUSINESS ADMINISTRATION
WASHINGTON, D.C. 20416

JUL 21 1980

Ms. Shirley Sirota Rosenberg
SSR, Incorporated
116 4th Street, S.E.
Washington, D.C. 20003

Dear Ms. Rosenberg:

We regret to inform you that SSR, Incorporated has been declined for 8(a) program participation.

It has been determined that you, the individual upon whom eligibility is based, are not eligible for a determination of social disadvantage based on a claim of apparent sexual discrimination. P.L. 95-507 does not recognize sexual discrimination as one of the elements which may lead to a determination of social disadvantage. The three elements recognized in that law as leading to a possible determination of social disadvantage are racial or ethnic prejudice or cultural bias. For the purposes of this program, sexual discrimination is not equated to cultural bias.

Should you wish your application to be reconsidered, the Small Business Administration will accept only one such request. Within thirty calendar days from receipt of this letter you must submit all information and documentation pertinent to overcoming each specific reason for decline which was not available at the time of decision to our SBA Washington District Office, 1030 15th Street, N.W., Suite 250, Washington, D.C. 20416, attention: District Director.

Sincerely,

Paul R. Brewer
William A. Clement, Jr.
Associate Administrator for
Minority Small Business

Attachment I

U.S. GOVERNMENT
SMALL BUSINESS ADMINISTRATION
WASHINGTON, D.C. 20416

MAY 30 1980

Ms. Margaret Shaffer
Paradigm, Inc.
8815 Quiet Stream Court
Potomac, Maryland 20854

Dear Ms. Shaffer:

I have reviewed your request for reconsideration of our initial decision to decline your firm for 8(a) program participation and have decided to uphold the decision.

Public Law 95-507, in Title II, Chapter I, Section 8(A)(5), defines socially disadvantaged individuals as "...those who have been subjected to racial or ethnic prejudice or cultural bias." Sexual discrimination is not included as one of the elements which may lead to a determination of social disadvantage, and neither does the Small Business Administration equate sexual discrimination to cultural bias.

In declining your application for program participation I have determined that although you may indeed have been subjected to sexual discrimination, P.L. 95-507 does not recognize sexual discrimination as one of the elements that may lead to a determination of social disadvantage and as previously stated, the SBA does not equate sexual discrimination to cultural bias.

Since you have utilized the one request for reconsideration allowed under SBA policy, a reapplication for the 8(a) program will not be accepted until six months from the date of this letter.

We hope you will avail yourself of the other SBA programs for which you are eligible.

Sincerely,

Joseph J. Lunn, Acting
William A. Clement, Jr.
Associate Administrator for
Minority Small Business

Attachment III

NATIONAL ASSOCIATION OF WOMEN GOVERNMENT CONTRACTORS

Resource Materials

For your review, we are also attaching:

- (1) a copy of the September 18, 1980 NAWFC testimony before the House;
- (2) NAWFC's Formal Petition, submitted through the law offices of Bosco, Curry & Paulsen, (then Bosco and Curry) to SBA for an administrative determination that women as a group, are socially disadvantaged;
- (3) Copies of all correspondence between Bosco and Curry with the SBA from January 1982 through October 1982. (Note in particular, Administrator Sanders' May 11 1982 denial of the petition; SBA's Director FOIA Kalcounos' March 5, 1982 disclosure that the Women's Business Enterprise Division had no existing information on women-owned businesses pursuant to the Congressional requirement for SBA reporting; Director, SBA's Business Development Program Saldivar's August 11, 1982 virtual admission that SBA has neglected to follow the Congressional directive to monitor the special problems that sex discrimination causes women-owned businesses, and the SBA General Counsel Webber's August 10, 1982 denial for Bosco and Curry's appeal for reconsideration.
- (4) Discussion between NAWFC official and the President of the United States on the topic of group inclusion of women federal contractors in the SBA's 8(a) business development program;
- (5) SBA Deputy Administrator Herrera's response of January 14, 1983, wherein NAWFC's petition is reconsidered and the denial sustained. We note that it is acknowledged that women federal contractors are indeed a minority (very small number) of the business population.
- (6) Correspondence between the NAWFC and the Civil Rights Commission on the current practice of P.L. 95-507 being interpreted somehow to supercede the Railroad Revitalization and Regulatory Act of 1976, wherein women are defined as minorities.

NATIONAL ASSOCIATION OF
WOMEN FEDERAL CONTRACTORS

THE FOLLOWING MATERIALS CONSTITUTE THE COMPLETE TESTIMONY OF THE NATIONAL ASSOCIATION OF WOMEN FEDERAL CONTRACTORS (NAWFC) PRESENTED IN PART BEFORE THE HOUSE SUBCOMMITTEE ON GENERAL OVERSIGHT AND MINORITY ENTERPRISE'S HEARING ON THE EFFECTIVENESS OF EXECUTIVE ORDER 12138 ON 18 SEPTEMBER 1980:

FORMAL STATEMENT OF THE NAWFC (Content Outline)

1. Objectives Of The Testimony.
2. The Uniqueness And Focus Of The NAWFC.
3. Events Leading To The Executive Order 12138; The Historical Efforts For The Inclusion Of Women As Eligibles For SBA's 8(a) Business Development Program.
4. Two Views Of Women's Business Enterprise: SBA's View And President Carter's View.
5. On Redirecting The SBA's Women's Business Enterprise Program.
6. Why There Should Not Be A Special Set-Aside Program For Women.
7. Sex Discrimination Is A Basis For Entry To SBA's 8(a) Business Development Program.
8. Conclusions.
9. Recommendations For Action.

OPEN LETTER TO CONGRESSMAN JOHN LAFALCE IN RESPONSE TO QUESTIONS RAISED AT THE HEARING.

ATTACHMENTS:

- A. References On Studies And Hearings On Women-In-Business.
- B. Civil Action No. 80-2310, A Complaint Against The SBA.

Statement of The
NATIONAL ASSOCIATION OF WOMEN FEDERAL CONTRACTORS
Before The
HOUSE SUBCOMMITTEE ON GENERAL OVERSIGHT AND MINORITY ENTERPRISE
On September 18, 1980

The National Association of Women Federal Contractors (NAWFC) wishes to thank the House of Representatives Subcommittee on General Oversight and Minority Enterprise and the Chairman, Congressman John LaFalce for inviting us to testify today.

1. Objectives.

NAWFC has three relevant and related objectives in testifying today. First, to suggest consideration of reprogramming the \$13.6 million dollars approved by the House of Representatives (by this Subcommittee) for the SBA's Office of Women's Business Enterprise to permit addressing the viability and vitality of existing women-owned businesses which sell, or seek to sell, to the federal government or to large federal contractors. Second, to clarify that, with rare exception, all women-owned businesses are either Small or Disadvantaged and therefore that all programs for their necessary assistance are already in place. And, third, as a consequence of and consistent with the first two objectives, and with the Senate's recent vote on Women's Business Enterprise, to seek the inclusion of women as an eligible group in P.L. 95-507 for the SBA's 8(a) program through the plan recommended by this very Subcommittee in its September, 1977 Report on Women in Business, until new legislation is obtained for women.

2. The Uniqueness And The Focus Of NAWFC.

The National Association of Women Federal Contractors was founded in January, 1980 immediately after the White House Conference on Small Business. The NAWFC is a nationwide, nonprofit, sponsored trade association representing those women of all racial, ethnic and cultural backgrounds who sell or who wish to sell their goods and/or services to the federal government as either prime or subcontractors. NAWFC is unique among organizations for women in business in at least three

relevant respects:

- We are the only organization which defines our active membership in terms of President Carter's Executive Order 12138 as "at least 51% owned, operated and controlled by a woman or women."
- NAWFC seeks to nurture the financial stability, and economic growth of existing women-owned businesses.
- In its commitment to fulfilling the recommendations of the studies and hearings by the Civil Rights Commission, relevant House and Senate Committees, the President's Task Force on Women Business Owners, and the International Women's Year Commission, NAWFC is the only organization which is currently seeking the inclusion of women in the federal government's existing protected procurement programs.

There are many substantive and worthwhile programs to assist women who wish to enter the business world. There also are many substantive and worthwhile programs to train women in the technical and financial management of their enterprises. These are not areas that NAWFC will discuss today. NAWFC wishes to discuss the fact that a women-owned business, as any other business, must have a market in which to sell and to suggest that the marketplace of the federal government is the marketplace over which this Subcommittee has the greatest control. The federal marketplace, because of its enormous size, can be the single largest benefactor of existing women-owned businesses.

If women are to be viable and active participants in the free enterprise system, then they must be allowed fair and equitable access to the federal marketplace. It is therefore to the Congress of the United States that NAWFC looks for assistance in providing protected procurement opportunities for women.

3. Events Leading To The Executive Order 12138; The Historical Efforts For The Inclusion of Women As Eligibles For SBA's 8(a) Business Development Program.

The fact that American women business owners are underrepresented in the free enterprise system is undisputed. Report after study after hearing (see Attachment A:) have indicated that women, regardless of their ability, have not been allowed the same opportunities, have not been given equal access to and have not received the same recognition in the business arena as have been accorded to others. This is particularly true in areas which are deemed "non-traditional," in such technologically or technically intensive industrial and research areas as energy, mining, bioengineering, synthetic fuels, defense weapon systems; in construction; in social surveys, econometrics and policy studies. In truth, these are areas in which both women and minorities are underrepresented. While steps have been and are being taken to correct the underrepresentation of minorities by legislative action, legally sustained by federal quotas and by Executive Orders, thus providing them with non-competitive access to the federal marketplace, the same steps have not been taken with respect to women.

The Commerce Department's published report on Women in Business, based on the 1972 Census Bureau survey, highlighted that women's business enterprise constituted less than 5% of all business enterprise, with an even more strikingly disproportionate share of the total dollar receipts of only three tenths of 1%. The latest which have been released by the Office of Federal Procurement Policy show that women-owned businesses received only 0.2% of all federal purchase dollars in FY79. Another rather illuminating finding, still not fully addressed, is that 98% of all women's business enterprise was being performed under the business form of sole proprietorship. The average women-owned sole proprietorship was found to have sales below \$25,000, and the average women-owned corporation was found to have sales below \$100,000 with a staff consisting of four members. This is an indication of "think smallism" as contrasted to the general business world where efficiency and economy of scale dictate large corporate structures.

Statistics and information on barriers indicating the virtual absence of women-owned businesses in the federal marketplace have led every prestigious group which has studied this issue to conclude that women need protected procurement in order to participate in any meaningful fashion. More specifically, every one of these groups has recommended the inclusion of women in the list of eligibles for the SBA 8(a) business development program. The Civil Rights Commission's in-depth study Minorities and Women as Government Contractors concluded that "minority and female entrepreneurs...encounter a great deal of skepticism regarding their ability to perform adequately on government contracts." The Commission urged that the affirmative action door be opened to women-- that SBA use the currently existing mechanism and find that women "as a group [are] eligible for participation in the 8(a) program."

In 1976 the International Women's Year Commission proposed that women be included in the SBA 8(a) program, and in November, 1977 at the grass roots Houston Conference, 2000 women delegates passed the Resolution on Women in Business, specifically requesting that women be accorded equal treatment with minorities: that is, that 8(a) be used for minorities and women.

In April, May and June of 1977, the predecessor of this Subcommittee, the Subcommittee on Minority Enterprise and General Oversight under the Chairmanship of Congressman Addabbo, conducted hearings on the status of women in business. The Subcommittee Report on Women in Business (Report No. 95-604, September 15, 1977) contains the following explicit statements regarding the impediments that women face due to sex discrimination:

"The Subcommittee is in receipt of numerous complaints from female entrepreneurs which indicate that their entrance into the business world is marked with a myriad of barriers resulting from both past and present sex discrimination. Further, we are advised that the Federal Government has not undertaken substantive measures to correct the situation. Our hearings were conducted for the purpose of exploring these and related issues. We shall not hesitate to exercise our oversight jurisdiction to the fullest legal extent when we receive complaints of discrimination in the business world which the Federal Government has failed to address.

Our laws cannot fairly serve anyone unless they fairly serve all. It was on this basis, guided by these principles, that the Subcommittee conducted these hearings."

Having studied all the evidence presented at the Hearings, the Subcommittee concluded:

- "That women, as a class of individuals, have been and continue to be precluded from equitable participation in our economy as business owners." (emphasis added)
- "That this lack of access to our business system is the direct and indirect result of sex discrimination." (emphasis added)
- "That the most severe handicap [to women] is social prejudice, often subtle and difficult to verbalize, but having a cumulative effect which unmistakably hampers women assuming their rightful place in the economy."
- "That many Federal procurement officers are not sensitive to the special problems of female entrepreneurs and that they do not take women in business seriously."
- "That the Small Business Administration has heretofore not assumed an aggressive role on behalf of women business persons and has, in fact, been content to ignore many of the special needs of women-in-business."
- "If women are identified as a group which is presently suffering from past inequities, we must resolve to afford them special assistance in an attempt to expeditiously compensate for the past."

- "That the Government should utilize its vast purchasing power to assist female owned businesses as well as small and minority businesses...viewing the female and minority population as a virtually untapped reservoir of talent, creativity and ingenuity which we simply cannot afford to ignore any longer."
(emphasis added)

Of particular importance is that --- based on data collected during three separate hearings on Women in Business --- in September, 1977 this very Subcommittee concluded:

"That the 8(a) program administered by the SBA represents the most significant effort of the Federal Government to channel Federal contracts to the 'economically or socially disadvantaged.' While we agree that women in business can establish 'disadvantage' due to sex discrimination, we would not urge their automatic inclusion in this program unless... SBA undertake the following: (emphasis added)

- (a) A reevaluation of eligibility criteria which would result in accepting applicants who, among other things, can demonstrate a potential for business success;
- (b) A review of supportive services and contract requirements needed to provide an adequate level of assistance to all program participants;
- (c) A study to determine if benefits derived from 8(a) assistance can be reasonably calculated to advance the status of women in business; and
- (d) The development of appropriate safeguards to insure that insofar as is possible, the program will not be exploited by unscrupulous individuals, or utilized by those not intended to benefit from the program."

The Subcommittee recommended that the SBA "conduct a study of the Section 8(a) program, as outlined in the Conclusions of the report [see above] , to determine the feasibility and desirability of utilizing this program to assist the female entrepreneur."

In the three years that have passed since the Subcommittee set forth its recommendation, NAWFC is not aware of any such study on the part of the SBA. However, the petitions for the inclusion of women in 8(a)

have continued.

The late Senator Hubert Humphrey, the champion of civil rights, urged the SBA to protect women equally with minorities. In November of 1977 the Senator wrote to the Director of SBA's 8(a) program saying: "It is my conviction that bona-fide female-owned and managed firms should benefit from affirmative action procurement."

And, during the spring of 1978, Ann Wexler, as Chair of President Carter's Task Force on Women Owned Businesses, wrote to Congressman Addabbo as Chair of the Subcommittee on Minority Enterprise and General Oversight saying that if it were the intention of Congress to identify certain groups that were presumed to be disadvantaged, and hence eligible for entry to the SBA 8(a) business development program, then American women business owners should be added to this list. Now, whereas H.R. 11318 was subsequently passed without including women as a presumptively disadvantaged group as were certain named minorities, the Report (No. 95-949, March 13, 1978) accompanying the H.R. 11318 displayed a clear indication that women are eligible for 8(a). Specifically, it is known that Congressmen Addabbo and Parren Mitchell, and Congresswoman Millicent Fenwick agreed to the following passage in the Report:

"The Committee also notes that social disadvantage within the meaning of paragraph (6) can arise from an individual's cultural background and the committee further realizes that deep rooted cultural convictions should not be considered a social cause over which the individual has control within the context of paragraph (6)...

When implementing the eligibility criteria creation by this subsection, the committee intends that SBA give most serious consideration to, among other, women business owners. The committee notes that sex discrimination, whether overt or subtle, can and does result in business impediments which are not generally common to all small business owners. Further, sex discrimination, since it involves interpersonal relationships, must be considered as resulting in social disadvantage within the meaning of this subsection. Therefore, in determining whether or not a particular woman is socially disadvantaged within the meaning of this subsection, SBA should seek not only

demonstrable signs of sex discrimination, but more important, the cumulative result of subtle discrimination which can and does become manifest in a number of differing ways." (emphasis added)

Against this backdrop, in May, 1979 President Carter signed Executive Order 12138 creating a national women's business enterprise policy. For the first time a working definition of women-owned business was given. Each department and agency of the Executive Branch was required to set goals, to develop plans, to monitor progress and, in all ways possible within the statutory authority, to "facilitate, preserve and strengthen women's business enterprise and to ensure full participation by women in the free enterprise system..." (emphasis added)

4. Two Views of Women's Business Enterprise: SBA's View and President Carter's View.

Whereas, Executive Order 12138 in plain language sets forth a broad mandate for the assurance of full participation of women-owned businesses in our free enterprise system, the SBA's Associate Administrator for Minority Small Business has barred individual women from entry to the 8(a) program by stating that "P.L. 95-507 does not recognize sexual discrimination as one of the elements that may lead to a determination of social disadvantage" and that "the SBA does not equate sexual discrimination to cultural bias." And, rather than challenging this position, the SBA's Office of Women's Business Enterprise (OWBE) has elected to focus on a plan which will not fulfill the Executive's mandate and will actually exacerbate existing circumstances surrounding women entrepreneurs.

At this time, the OWBE interprets its mission as one of expanding the number of qualified women in business and to stimulating the private sector to buy from the expanded group. Existing women-owned businesses, not finding an advocate in OWBE, have been forced to turn to the courts for an enforcement of the Executive's Order. (See Attachment B)

Because the SBA has focused on new starts, on the private sector as a buyer and is striving for the establishment of a business development program for the exclusive benefit of women, it seems fair to ask:

Why should this government be directing its attention to new starts and to traditional "women's businesses," which are characterized by low sales and few employees, and directing its attention to the "best effort" purchases of large federal contractors, while ignoring and even inhibiting women-owned businesses access to the \$100 billion dollar purchasing power of the public sector?

The federal government has institutionalized socio-economic programs for small business and for disadvantaged business. The purpose of these existing business development programs is to foster competition and to develop those businesses which have demonstrated an inability to compete due to (1) size alone (referred to as Small); and to (2) impediments in the marketplace which are caused by race discrimination, ethnic discrimination or by cultural bias (referred to as Disadvantaged).

At this time, there are only two tools available to procurement officials in the federal government: small business set-asides and 8(a) disadvantaged set-asides. And, there are only two purchasing plans now required of large federal contractors: a subcontracting plan for small businesses and a subcontracting plan for disadvantaged businesses. Many women-owned businesses are disadvantaged due to sex discrimination, as the Subcommittee noted in its September 1977 findings, but, because the SBA has taken the view it has, the federal government purchasing dollar is beyond their reach.

Just as the "minority business enterprise," as defined by Executive Order 11625, may be either Small or Disadvantaged, depending on the size of the specific business or the impediments due to discrimination

in the marketplace, so too are "women-owned businesses" as defined by Executive Order 12138 either Small or Disadvantaged.

Were the SBA to recognize this fact, then SBA's view of women's business enterprise would be consistent with that set forth by President Carter in his Executive Order 12138.

5. On Redirecting The SBA's Women's Business Enterprise Program.

On September 4, 1980 the Senate Appropriations Subcommittee on State, Commerce and the Judiciary recommended severe cuts in the budget request for the new Office of Women's Business Enterprise. The Senate objected to the establishment of special training programs and counseling centers for women on the basis that such services could be provided through the existing delivery system for small business and hence were considered redundant.

Inasmuch as H.P. 7584 was passed by the House of Representatives on August 23, 1980, and since the bill contains the full funding for SBA salaries and expenses including those for the Women's Business Enterprise program, the NAWFC requests that the House uphold the full funding for the women's program but provide guidance for an alternative use of such funds.

In speaking on the behalf of those women-owned businesses which sell, or seek to sell, to the federal government either as primes or as subcontractors, the NAWFC requests that this Subcommittee give serious consideration to recommending use of the approved OWBE funding for the growth and development of existing women-owned businesses through the massive purchasing power of the federal government. Such efforts should include, but not be limited to, counseling women as to eligibility for 8(a), assisting women applicants in submitting materials required for entrance to 8(a), procurement training for the OWBE's staff, developing foreign market opportunities, developing subcontracting opportunities with large federal contractors.

6. Why There Should Not Be A Special Set-Aside Program For Women.

NAWFC agrees with the Senate's desire to avoid redundancy. In reviewing P.L. 95-507, Executive Order 12138, and SBA regulations, and according to such prestigious institutions as the Office of the Secretary of Defense and certain of the aerospace industries, it is clear that there is no reason for a special procurement track for women alone. Such a track would be redundant and costly.

There is no necessity for a special protective procurement program for women alone or, for that matter, special subcontracting plans for women alone because women-owned businesses are, in fact, either Small or Disadvantaged and hence can be treated by either of these delivery systems.

Furthermore, establishing set-asides for women would set a precedent for a type of preferential treatment which would be sought by others, including the Vietnam Veterans, and the Handicapped. Were set-asides for "special groups" to be established, federal procurement officials would be required to have the wisdom of Solomon to determine which group should get which procurement. There is a real danger that proliferation of independent soci-economic programs outside of the Small and the Disadvantaged programs could threaten the collapse of the entire federal purchasing process into irredeemable chaos or could lead to awesome in-fighting among these groups concerning which group should get which set-asides.

7. Sex Discrimination Is A Basis For Entry To SBA's 8(a) Business Development Program.

The SBA has chosen to ignore the Executive Order that mandates an assurance for the full participation of women-owned businesses in all of the government's business development programs. More troublesome, is the Agency's blatant disregard of the impact of sex discrimination in the federal marketplace, and of the findings and recommendations of this Subcommittee.

This Subcommittee has already identified the fundamental factors

to be considered, and these factors apply as equally to minorities as to women:

1. Does the women-owned business have growth and
2. Does the federal government buy or plan to buy the goods and/or services that the women-owned business sells?
3. Can the management, technical training, financial assistance and procurements provided to the women-owned business be expected to make it a viable participant in the free enterprise system?
4. Can administrative or legal safeguards be devised so as to prevent "fronting"?

Were the SBA to answer these questions, then women could be added to those eligible for 8(a), and the 8(a) program would be a fair and just affirmative action program for minorities and women.

In addition to the above eligibility criteria, a rather straightforward, legally sustainable approach for determining eligibility was offered by Congressman Herman Badillo when he was a member of this Subcommittee. Mr. Badillo recommended that the SBA should look to the population statistics in the various sectors of the free enterprise system. Where there is underrepresentation of specific groups, it should be evident, he reasoned, that individuals who are members of these groups should be afforded government protection and assistance. Mr. Badillo indicated that this was the very basis upon which affirmative action in employment was upheld by the Supreme Court.

8. Conclusions.

If women are to become viable and active participants in the free enterprise system, then they must be allowed fair and equitable access to the federal marketplace. It is to the Congress of the United States that NAWPC looks for assistance in providing guidance and assistance for women-owned businesses in the federal marketplace.

Despite the hearings, recommendations and Executive Order, for women-owned businesses which wish to sell to the federal government, time has stood still. The Executive Order 12138 lacks the teeth necessary to make its impact felt. It does not give agency procurement officials the means to achieve the women-owned business goals.

Procurement officials, under pressure to reach their goals of sales to women entrepreneurs and without the proper mechanisms, have in some cases knowingly-resorted to improper means. These actions of questionable legality would not occur to bona-fide women-owned businesses if their businesses were subject to the same scrutiny and controls as are applied to 8(a) firms-- any more than they are permitted for minorities in the program.

It is within the power of this Congress to affect all this.

It is within the authority of this Congress to make Executive Order 12138 a powerful and influential tool in achieving the equality of women-owned businesses in the federal marketplace.

9. Recommendations For Action.

- NAWFC looks to this Subcommittee, by moving to implement its own findings of 1977, to now charge the SBA with studying the four issues that the Subcommittee raised and, based upon the completion of such a study, expeditiously move to include women as as a group in the Subsection 8(a) of the Small Business Act.
- Confirm that almost all women-owned businesses are either Small or Disadvantaged and that therefore they should have full access to all existing business development programs for Small and/or 8(a) Disadvantaged businesses making additional, separate legislation redundant and unnecessary.
- Provide guidance to the SBA's Office of Women's Business Enterprise to allocate approved funds to the development of existing women-owned businesses that sell, or seek to sell, to the federal government, in addition to those women-owned businesses which sell to the private sector only.
- The Subcommittee require a General Accounting Office audit of the SBA's implementation of the mandatory requirement of the Executive Order 12138 for the full participation of women in all of SBA's business development programs.

NATIONAL ASSOCIATION OF WOMEN FEDERAL CONTRACTORS

September 26, 1980

The Honorable John J. LaFalce, Chairman
United States House of Representatives
Subcommittee on General Oversight and
Minority Enterprise
2361 Rayburn House Office Building
Washington, D. C. 20515

Dear Congressman LaFalce:

We of the National Association of Women Federal Contractors (NAWFC) believe that you raised some very thoughtful and incisive questions at your recent hearing on the effectiveness of Executive Order 12138. We would like, therefore, to address your questions as a supplement to our prepared statement which we summarized at the September 18, 1980 hearing.

The following questions are not verbatim, but are rather a paraphrase of the sense of what we understood was being asked.

Question Raised By Mr. LaFalce: Should the government give preferential treatment to any business entity?

Response Given By The NAWFC: The answer, based on legislative history, is yes. It has been formally recognized that it is in the national interest to give preferential treatment to business entities which are defined as Small and those which are defined as Disadvantaged. Specifically, the Small Business Act of 1953 was enacted because the Congress declared

"that only through full and free competition can free markets, free entry into business, and opportunities for the expression and growth of personal initiative and individual judgment be assured...Such security and well being of this Nation cannot be realized unless the actual and potential capacity of small business is encouraged and developed." (Note (1))

The Small Business Administration was established to

"make loans, guide Federal procurement, provide management training and be the advocate of small business." (Note (1))

Public Law 95-507, Amending the Small Business Act and the Small Business Investment Act of 1958, was enacted in October 1978 because Congress found support for the

"premise that many individuals are socially and econom-

Furthering the interests of all women entrepreneurs who sell, or want to sell, their goods and services to the federal government and to large federal contractors

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Dr. Marilyn Andrusis, President, NAWFC, P.O. Box 5543, Washington, D.C. 20016

ically disadvantaged as a result of being identified as members of certain groups..." And, further, "that it is in the national interest to expeditiously improve the condition of the disadvantaged and that this purpose can be materially advanced through the Federal purchasing system." (Note (2))

Question Raised By Mr. LaFalce: Should we be interested in providing special assistance to women who are highly educated and wealthy?

Response Given By The NAWFC: The issue of wealth, as Congressman LaFalce was quick to admit, is a worst case scenario--and, we believe, a false issue. Additionally, the Standard Operating Procedures for the SBA 8(a) program will effectively screen out those wealthy women who do not need business development assistance. The real question for the Subcommittee to ask is:

Should we be interested in providing assistance to women who, though qualified to operate the business which they own and control, are unable to compete in the free enterprise system due to size alone (Small) or due to impediments caused by discriminatory practices in the marketplace (Disadvantaged)?

The real question, however, has already been answered in the affirmative by this Subcommittee in October, 1978. Congressman Joseph Addabbo, then Chairman, submitted a Report to accompany H.R. 11318 from the committee on conference in which the following passage appears:

"The standards must not deny admission to the 8(a) program to applicants merely because they have managed to acquire a quality education. Indeed, such an education may be a prerequisite for the development of a viable business. Nor shall past or present employment by itself be used as a criteria for denial of an applicant's admission to the program. Applicants who have managed in this manner to prepare themselves to successfully participate in the free enterprise system should not be denied admission to the 8(a) program for business development for having done so." (Note (3))

Note (1): "From Probation to World Renown, The Small Business Administration, Its History and Development," by Ray E. Stull, S#191, July 30, 1973.

Note (2): P.L. 95-507

Note (3): "Amending the Small Business Act and the Small Business Investment Act of 1958," House of Representatives Report No. 95-1714, ordered to be printed October 4, 1978.

Question Raised By Mr. LaFalce: The 8(a) program is designed to be a business development program, unlike the small business set-aside program whose purpose is to sustain small businesses by continuously providing contracts year in and year out. Aren't we running the 8(a) program as a subsidy program for contract handouts year in and year out, and never graduating firms which can compete? Should we put women into this?

Response Given By The NAWFC: The purpose of this hearing is to assess the effectiveness of Executive Order 12138. It seems inappropriate within this context to raise the issue of the management of the SBA's 8(a) program; nor is it appropriate to couple women-owned businesses as a group which is presently excluded from the 8(a) program with the question of SBA's management of the program. We believe the real question to be asked is:

Why should women business owners be added to those eligible for the 8(a) business development program?

The answer to this valid question is that inclusion in SBA's 8(a) program would give women business owners immediate access to the only extant system comprehensive enough to fulfill all requirements given to each department and agency of the Executive Branch by Executive Order 12138.

The SBA's 8(a) program, as authorized by P.L. 95-507, is a full services business development program designed specifically to foster the growth and competitive capability of firms which are underrepresented in the free enterprise system due to past and present discriminatory practices in the marketplace. Specifically, an 8(a) firm can obtain management and technical assistance, financial assistance (including 100% loan guarantees, grants allowing the purchase of equipments and plants necessary to support contract efforts), procurement opportunities.

It should be clear that were the 8(a) program managed properly, and were women considered eligible to benefit from this existing system, the Executive Order 12138 could be effective.

The issues raised by Congressman LaFalce--the development of competitive abilities, and determination as to when sufficient competitive ability has been achieved to warrant graduation from the program-- are separate and apart from the case in point: to wit, the ineffectiveness of Executive Order 12138 because goals have been established for women-owned businesses and yet no means have been provided to achieve these goals. Were the SBA to conduct the study requested by this Subcommittee in September 1977, and then to include women as eligible for the 8(a) program, the Executive Order 12138 could be as effective for women's business enterprise as Executive Order 11625 is for minority business enterprise.

Respectfully submitted,

NATIONAL ASSOCIATION OF WOMEN FEDERAL CONTRACTORS

Marilyn W. Andrulis

Marilyn W. Andrulis, Ph.D.
President

References On Studies And Hearings On Women-In-Business

- (1) "Establish an Associate Administrator at SBA for Women's Business Enterprise," Hearing before the Select Committee on Small Business, United States Senate, 95th Congress, 1st Session, on S. 1526, A Bill to Establish an Associate Administrator at SBA for Women's Business Enterprise, June 16, 1977, page 5
- (2) Executive Order 12138 of May 18, 1979, "Creating a National Women's Business Enterprise Policy and Prescribing Arrangements for Developing, Coordinating and Implementing a National Program for Women's Business Enterprise, Federal Register, Volume 44, No. 100, Presidential Documents, page 29637
- (3) The Bottom Line: Unequal Enterprise in America, report of the Interagency Task Force on Women Business Owners, see "VI Marketing and Procurement," pages 15 and 16, 1979.
- (4) United States Commission on Civil Rights Report "Minorities and Women as Government Contractors," May 1975
- (5) House of Representative Hearings on Women in Business, "Hearings before the Subcommittee on Minority Enterprise and General Oversight of the Committee on Small Business," 95th Congress, 1st Session, April 5, May 24, and June 7, 1977
- (6) "Women in Business", a Report of the Subcommittee on Minority Enterprise and General Oversight of the Committee on Small Business, House Report No. 95-604, Union Calendar No. 315, September 15, 1977
- (7) "Extending Services of Women Entrepreneurs in Government Business," recommendation by Women in Employment Committee, approved by the International Women Years Commission on February 27, 1976
- (8) Resolution on Women in Business, International Women's Year Commission, Houston Convergence, November 1977
- (9) "Women-Owned Businesses 1972, U.S. Department of Commerce Bureau of Census and the Office of Minority Business Enterprise," WB 72
- (10) "H.R. 567, H.R. 4960, and H.R. 2379," Hearings before the Subcommittee on Minority Enterprise and General Oversight of Committee on Small Business, House of Representatives, 95th Congress, 1st Session, September 27, 1977, pages 339-345; and September 29, 1977 pages 3-49

- (11) Senator Hubert H. Humphrey, Co-Chairman, Subcommittee on Economic Growth and Stabilization letter of November 4, 1977 to Mr. Winford Smith, Director, Office of Business Development, SBA Headquarters
- (12) "Amending the Small Business Act and The Small Business Investment Act of 1958," HOUSe of Representatives Report No. 95-549, 95th Congress, 2nd Session, Mr. Smith of Iowa, from the Committee on Small Business, submitted the following Report (to accompany H.R. 11319), March 13, 1978

Reference B.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIASHIRLEY S. ROSENBERG
116 - 4th Street, S.E.
Washington, D.C. 20003,S.S.R., INC.
116 - 4th Street, S.E.
Washington, D.C. 20003,MARGARET SHAFFER
8815 Quiet Stream Court
Potomac, Maryland 20854,PARADIGM, INC.
8815 Quiet Stream Court
Potomac, Maryland 20854,MAXINE M. MOUNT
173 Woolper Avenue
Cincinnati, Ohio 45220,

and

BUILDING SERVICES UNLIMITED, INC.
120 West 5th Street
Cincinnati, Ohio 45202,

PLAINTIFFS

v.

THE UNITED STATES SMALL BUSINESS ADMINISTRATION
1441 L Street, N.W.
Washington, D.C. 20416,A. VERNON WEAVER, individually
and as Administrator of the
Small Business Administration
1441 L Street, N.W.
Washington, D.C. 20416,

and

WILLIAM A. CLEMENT, JR., individually
and as Associate Administrator for
Minority Small Business and Capital
Development, Small Business Administration
1441 L Street, N.W.
Washington, D.C. 20416,

DEFENDANTS

JOHNSON, T.J.

Civil

Action

No.

80- 2319

SEP 11 1980

COMPLAINT FOR DECLARATORY AND INJUNCTIVE
RELIEF AND DAMAGES

1. This action arises under §§(b) and 8(a) of the Small

Business Act, as amended, 14 U.S.C. §§633(b), 637(a); 5 U.S.C. §§552(a)(1) and 553; 42 U.S.C. §1985(3); Executive Orders 11625 and 12138; and the Due Process Clause of the Fifth Amendment to the United States Constitution. The matter in controversy exceeds Ten Thousand Dollars, exclusive of interest, costs and attorneys' fees.

2. The jurisdiction of this Court is invoked under 28 U.S.C. §§1331(a), 1343, 1361 and 2201; 5 U.S.C. §702; and 15 U.S.C. §634(b)(1). Venue lies in this judicial district under 28 U.S.C. §§1391(b) and (e).

3. Plaintiff Shirley S. Rosenberg, a white woman, is a citizen of the United States and a resident of the District of Columbia. She is president, chief executive officer, and sole stockholder of plaintiff S.S.R., Inc. Plaintiff Rosenberg has full time control of the daily management and operation of S.S.R., Inc.

4. Plaintiff S.S.R., Inc. is a corporation organized under the laws of the State of Maryland and licensed to do business in the District of Columbia. S.S.R., Inc. is engaged in the business of writing, editing, designing, and revising publications on behalf of both government agencies and private businesses. It is a small business as defined in 15 U.S.C. §632 and 13 C.F.R. §121.3-8.

5. Plaintiff Margaret T. Shaffer, a white woman, is a citizen of the United States and a resident of the State of Maryland. She is president, chief executive officer, and sole stockholder of plaintiff Paradigm, Inc. Plaintiff Shaffer has full time control of the daily management and operation of Paradigm, Inc.

6. Plaintiff Paradigm, Inc. is a corporation organized under the laws of the State of Maryland. Paradigm, Inc. is

engaged in the business of survey research, training, and management and personnel consulting with government agencies and private businesses. It is a small business as defined in 15 U.S.C. §632 and 13 C.F.R. §121.3-8.

7. Plaintiff Maxine M. Mount, a white woman, is a citizen of the United States and a resident of the State of Ohio. She is president, chief executive officer, and sole stockholder of plaintiff Building Services Unlimited, Inc. Plaintiff Mount has full time control of the daily management and operation of Building Services Unlimited, Inc.

8. Plaintiff Building Services Unlimited, Inc. is a corporation organized under the laws of the State of Ohio. Building Services Unlimited, Inc. is engaged in the business of providing cleaning and custodial services for both government agencies and private businesses. It is a small business as defined in 15 U.S.C. §632 and 13 C.F.R. §121.3-8.

9. Defendant United States Small Business Administration (SBA) is an agency of the United States created by 15 U.S.C. §633.

10. The individual defendants are officials of defendant SBA, and are sued because of acts they performed in their official capacity or under color of law, in violation of federal statutes, SBA regulations, Executive Orders, and the United States Constitution. Each individual defendant's position is listed in the caption to this complaint.

11. Under the so-called §8(a) program, 15 U.S.C. §637(a), defendants enter into contracts with federal agencies or departments and arrange for the performance of these contracts by negotiating or otherwise subletting them to small businesses deemed "socially and economically disadvantaged." Upon

information and belief, most of these contracts are negotiated or sublet outside of competitive bidding procedures. In addition to negotiating and subletting contracts, SBA is empowered by §8(a) to provide technical and management assistance to businesses which participate in the program.

12. The Small Business Act, as amended in 1973, states that "many [socially and economically disadvantaged] persons are socially disadvantaged because of their identification as members of certain groups that have suffered the effects of discriminatory practices...over which they have no control" and that "such groups include, but are not limited to, Black Americans, Hispanic Americans, Native Americans, and other minorities." 15 U.S.C. §631(e)(1)(B) and (C). The Small Business Act defines "socially disadvantaged individuals" as "those who have been subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group." 15 U.S.C. §637(a)(5).

"Economically disadvantaged individuals" are defined as "socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities." 15 U.S.C. §637(a)(6). With regard to the §8(a) program, the Small Business Act does not contain a presumption of social disadvantage based on membership in an identifiable group. In contrast, the Act does contain such a presumption with regard to the §8(d) program, which concerns the extent to which the recipient of a government contract should negotiate sub-contracts with disadvantaged businesses.

13. SBA regulations governing the §8(a) program contain a rebuttable presumption that members of the following groups are socially disadvantaged individuals: Black Americans, Hispanic Americans, and Native Americans. 13 C.F.R. §101.1-1(c)(3)(i). Other groups may apply

to SBA to be included in this category; upon information and belief, SBA has designated Asian Americans as a group presumed to be socially disadvantaged. Individuals who are not members of groups presumed to be socially disadvantaged must "demonstrate ...that they have individually been subjected to chronic prejudice, or cultural bias." Id. Under the regulations, social disadvantage is to be determined on a case-by-case basis, even when an individual is a member of one of the groups presumed disadvantaged. 13 C.F.R. §124.1-1(c)(3)(ii).

14. SBA regulations require that applicants found to be socially disadvantaged also must show economic disadvantage. In determining economic disadvantage, the regulations require that SBA consider the following factors: personal and business assets; personal and business net worth; personal and business income and profits; availability of financing; bonding capability; availability of outside equity capital; and available markets. 13 C.F.R. §124.1-1(c)(4)(ii).

15. In addition to these regulations, SBA has issued "standard operating procedures" (SOPs), which describe further the eligibility requirements for the 8(a) program. These SOPs, which went into effect on September 4, 1979, never were published for comment in the Federal Register. SOP 80-05-2(b) states that a member of the groups set forth in the regulations is presumed to be socially disadvantaged unless SBA can provide "substantial evidence and documentation" that the individual is not disadvantaged. SBA will find individuals who are not members of the selected groups to be socially disadvantaged "only on the basis of substantial evidence and when it can be directly correlated that such individuals suffered the effects of racial and ethnic prejudice or cultural bias or similar invidious circumstances."

16. Nothing in the Small Business Act, SBA regulations, or SBA SOPs limits the maximum number of contracts which defendant can negotiate under §8(a). Nor is there any limit to the number of businesses which defendants can admit to the §8(a) program.

17. On June 22, 1979, plaintiff Rosenberg, acting on behalf of plaintiff S.S.R., Inc., submitted an application for admission to the §8(a) program. Plaintiff Rosenberg submitted all documentation required by defendants' regulations and SOPs. The application contained information concerning S.S.R., Inc.'s corporate organization, history, and financial experience; the background of the firm's stockholder and officers; the services provided by the firm; and the firm's expectations for growth if admitted to the program.

18. The application also provided detailed information to support a finding by defendants that plaintiff Rosenberg was both socially and economically disadvantaged as those terms are defined in the Small Business Act and SBA regulations. This information included at least one specific instance of individual sex discrimination against plaintiff Rosenberg, along with a detailed account of plaintiff S.S.R. Inc.'s inability to borrow money from normal commercial sources and plaintiff Rosenberg's difficulties in competing in the male-dominated marketplace.

19. On July 23, 1980, plaintiff Rosenberg received a letter dated July 21 from defendants denying her application to the §8(a) program. In spite of a reference in the letter to "apparent sexual discrimination," defendants concluded that plaintiff Rosenberg did not suffer social disadvantage because "sexual discrimination is not equated to cultural bias." The letter also states that the Small Business Act "does not recognize sexual discrimination as one of the elements which may lead to a determination of social disadvantage." See Attachment I.

20. Upon being informed by plaintiffs' counsel that plaintiffs intended to file this action on August 1, 1980, defendants sent plaintiff Rosenberg a letter dated July 31, 1980, which purported to rescind the decision rejecting her application to the §8(a) program, so that the decision could be reviewed. The letter stated that defendant would notify plaintiff Rosenberg of the results of the review within 30 days. Neither plaintiff Rosenberg nor her counsel requested this review. See Attachment II.

21. More than 30 days have passed since July 31, 1980, and, despite repeated inquiries by her counsel, defendants have failed to notify plaintiff Rosenberg of the results of the purported review. Plaintiff Rosenberg therefore continues to be unable to participate in the §8(a) program.

22. Defendants' rejection of plaintiff Rosenberg's application for admission to the §8(a) program has caused and continues to cause plaintiffs Rosenberg and S.S.R., Inc. substantial economic harm, since they are unable to receive government contracts which they would have received if defendants had granted plaintiff Rosenberg's application.

23. On April 10, 1979, plaintiff Shaffer, acting on behalf of plaintiff Paradigm, Inc., submitted an application for admission to the §8(a) program. Plaintiff Shaffer submitted all documentation required by defendants' regulations and SOPs. The application contained information concerning Paradigm's corporate organization, history, and financial experience; the background of the firm's stockholder and officers; the services provided by the firm; and the firm's expectations for growth if admitted to the program.

24. The application also provided detailed information to support a finding by defendants that plaintiff Shaffer was both socially and economically disadvantaged as those terms are defined in the Small Business Act and SBA regulations. This information

included numerous instances of individual sex discrimination and sexual harassment against plaintiff Shaffer, along with a detailed account of plaintiff Paradigm's inability to borrow money from normal commercial sources and plaintiff Shaffer's difficulties in competing in the male-dominated marketplace.

25. On December 19, 1979, defendants notified plaintiff Shaffer that her application for admission to the §8(a) program had been denied. On January 23, 1980, plaintiff Shaffer submitted a timely request for reconsideration of her application.

26. By letter dated May 30, 1980, defendants notified plaintiff Shaffer that her request for reconsideration had been denied. Although defendants stated that plaintiff Shaffer "may indeed have been subjected to sexual discrimination," defendants concluded that "sexual discrimination is not...one of the elements which may lead to a determination of social disadvantage, and neither does the Small Business Administration equate sexual discrimination to cultural bias." See Attachment III.

27. Upon being informed by plaintiffs' counsel that plaintiffs intended to file this action on August 1, 1980, defendants sent plaintiff Shaffer a letter dated July 31, 1980, which purported to rescind the decision rejecting her application to the §8(a) program, so that the decision could be reviewed. The letter stated that defendant would notify plaintiff Shaffer of the results of the review within 30 days. Neither plaintiff Shaffer nor her counsel requested this review. See Attachment IV.

28. More than 30 days have passed since July 31, 1980, and, despite repeated inquiries by her counsel, defendants have failed to notify plaintiff Shaffer of the results of the purported review. Plaintiff Shaffer therefore continues to be unable to participate in the §8(a) program.

29. Defendants' rejection of plaintiff Shaffer's application for admission to the §8(a) program has caused and will continue

to cause plaintiffs Shaffer and Paradigm, Inc. substantial economic harm, since they are unable to receive government contracts which they would have received if defendants had granted plaintiff Shaffer's application.

30. In May, 1979, plaintiff Mount, acting on behalf of plaintiff Building Services Unlimited, Inc., submitted an application for admission to the 58(a) program. Plaintiff Mount submitted all documentation required by defendants' regulations and SOPs. The application contained information concerning Building Services Unlimited, Inc.'s corporate organization, history and financial experience; the background of the firm's stockholder and officers; the services provided by the firm; and the firm's expectations for growth if admitted to the program.

31. The application also provided detailed information to support a finding by defendants that plaintiff Mount was both socially and economically disadvantaged as those terms are defined in the Small Business Act and SBA regulations. This information included specific instances of individual sex discrimination against plaintiff Mount, along with a detailed account of Building Services Unlimited, Inc.'s inability to borrow money from normal commercial sources and plaintiff Mount's difficulties in competing in the male-dominated marketplace.

32. By letter dated February 21, 1980, defendants rejected plaintiff Mount's application to the 58(a) program. Although defendants admitted that plaintiff Mount made "a case for apparent sexual discrimination," defendants stated that the Small Business Act "does not recognize sexual discrimination as one of the elements leading to social disadvantage and neither does the SBA equate sexual discrimination to cultural bias." See Attachment V.

33. Plaintiff Mount submitted a timely request for reconsideration, which defendants denied by letter dated July 21, 1980. In that letter, defendants stated that plaintiff's request was being denied "for the same reasons stated in [the] letter to you dated February 21, 1980." See Attachment VI.

34. Defendants' rejection of plaintiff Mount's application for admission to §8(a) program has caused and will continue to cause plaintiffs Mount and Building Services Unlimited, Inc. substantial economic harm, since they are unable to receive government contracts which they would have received if defendants had granted plaintiff Mount's application.

35. Defendants' position that sexual discrimination cannot lead to a determination of social disadvantage because sexual discrimination cannot be equated to cultural bias is inconsistent with positions defendants have taken before Congress and the media, and in at least one administrative decision.

36. Upon information and belief, only approximately five percent of the businesses currently participating in the §8(a) program are owned or controlled by women.

COUNT I

37. Plaintiffs repeat the allegations of paragraph 3 through 36 of the Complaint as paragraph 37.

38. In rejecting plaintiffs' applications for admission to the §8(a) program, defendants violated §8(a) of the Small Business Act, as amended, 15 U.S.C. §637(a), and SBA regulations, 13 C.F.R. §124.1-1, by concluding unlawfully that sex discrimination cannot give rise to "cultural bias" as that term is used in the Act and regulations.

COUNT II

39. Plaintiffs repeat the allegations of paragraphs 3 through 36 of the Complaint as paragraph 39.

40. By rejecting plaintiffs' applications for admission to the S8(a) program, defendants, individually and as a group, discriminated against plaintiffs on the basis of sex, and deprived them of the equal protection of the laws, in violation of §4(b) of the Small Business Act, as amended, 15 U.S.C. §633(b); 42 U.S.C. §1985(3); Executive Orders 11025 and 12138; and the Due Process Clause of the Fifth Amendment to the United States Constitution.

COUNT III

41. Plaintiffs repeat the allegations of paragraphs 3 through 36 of the Complaint as paragraph 41.

42. Defendants, by creating a presumption of social disadvantage in favor of certain groups while at the same time concluding that sex discrimination cannot give rise to social disadvantage, have violated the Due Process Clause of the Fifth Amendment, since their actions have resulted in invidious discrimination against plaintiffs, who have been victims of disadvantage and discrimination to a degree equal to members of the favored groups.

COUNT IV

43. Plaintiffs repeat the allegations of paragraphs 3 through 36 of the Complaint as paragraph 43.

44. Defendants' actions in denying plaintiffs' applications for admission to the S8(a) program violated §552(a) and §553 of the Administrative Procedures Act, 5 U.S.C. §552(a), §553;

13 C.F.R. §101.9; and the Due Process Clause of the Fifth Amendment, on the following grounds:

a. Defendants' conclusion that sex discrimination cannot be the basis of a claim of social disadvantage is a substantive rule of general applicability and a statement of general policy or interpretation, yet it has not been published in the Federal Register and has not been subject to notice and comment by interested parties; and

b. Defendants' standards contained in SBA/SOP 80-05-8 are substantive rules of general applicability and statements of general policy or interpretation, which have not been published in the Federal Register and have not been subject to notice and comment by interested parties.

WHEREFORE, plaintiffs demand judgment:

1. Declaring that defendants acted unlawfully in denying plaintiffs' applications for admission to the §8(a) program;

2. Ordering defendants immediately to admit plaintiffs as full participants in the §8(a) program, with all the rights and duties of all other participants in the programs;

3. Awarding plaintiffs the actual damages they have suffered and continue to suffer as a result of defendants' unlawful actions; and

4. Awarding such other relief as the Court deems just and proper.

Respectfully submitted by:

Linda R. Singer
Linda R. Singer, Esq.
Ronald A. Schechter, Esq.
Goldfarb, Singer & Austern
918 Sixteenth Street, N.W.
Suite 503
Washington, D.C. 20006
(202) 466-3030

Counsel for Plaintiffs



U.S. GOVERNMENT
SMALL BUSINESS ADMINISTRATION
WASHINGTON, D.C. 20416

JUL 21 1960

Ms. Shirley Sirota Rosenberg
SSR, Incorporated
116 4th Street, S.E.
Washington, D.C. 20003

Dear Ms. Rosenberg:

We regret to inform you that SSR, Incorporated has been declined for 8(a) program participation.

It has been determined that you, the individual upon whom eligibility is based, are not eligible for a determination of social disadvantage based on a claim of apparent sexual discrimination. P.L. 95-507 does not recognize sexual discrimination as one of the elements which may lead to a determination of social disadvantage. The three elements recognized in that law as leading to a possible determination of social disadvantage are racial or ethnic prejudice or cultural bias. For the purposes of this program, sexual discrimination is not equated to cultural bias.

Should you wish you application to be reconsidered, the Small Business Administration will accept only one such request. Within thirty calendar days from receipt of this letter you must submit all information and documentation pertinent to overcoming each specific reason for decline which was not available at the time of decision to our SBA Washington District Office, 1030 15th Street, N.W., Suite 250, Washington, D.C. 20416, attention: District Director.

Sincerely,

Paul R. Browne
William A. Clement, Jr.
Associate Administrator for
Minority Small Business

Attachment I



U.S. GOVERNMENT
SMALL BUSINESS ADMINISTRATION
WASHINGTON, D.C. 20416

JUL 31 1980

Ms: Shirley Sizota Rosenberg
SSA, Incorporated
116 4th Street, S.E.
Washington, D.C. 20003

Dear Ms. Rosenberg:

This is in further reference to our letter of July 21, 1980, in which SBA declined SSA, Incorporated's application for 8(a) program participation.

We have recently been contacted by Ms. Linda Singer of the law firm of Goldfarb, Singer & Austern, who, on your behalf, expressed disagreement with this decision. In light of Ms. Singer's objection, SBA has decided to again review your application and render a final decision on it.

Accordingly, we are rescinding our July 21 letter. Our review of your application will be expedited and we expect to notify you of our decision within thirty days.

Sincerely,

Paul R. Bivins
acting
William A. Clement, Jr.
Associate Administrator for
Minority Small Business

cc: Ms. Linda Singer
Goldfarb, Singer & Austern
918 16th Street, N.W.
Washington, D.C. 20006

Attachment II



U.S. GOVERNMENT
SMALL BUSINESS ADMINISTRATION
WASHINGTON, D.C. 20416

MAY 30 1967

Ms. Margaret Shaffer
Paradigm, Inc.
8813 Quiet Stream Court
Petoskey, Maryland 20836

Dear Ms. Shaffer:

I have reviewed your request for reconsideration of our initial decision to decline your firm for 8(a) program participation and have decided to uphold the decision.

Public Law 95-507, in Title II, Chapter I, Section 8(A) (3), defines socially disadvantaged individuals as "...those who have been subjected to racial or ethnic prejudice or cultural bias." Sexual discrimination is not included as one of the elements which may lead to a determination of social disadvantage, and neither does the Small Business Administration equate sexual discrimination to cultural bias.

In declining your application for program participation I have determined that although you may indeed have been subjected to sexual discrimination, P.L. 95-507 does not recognize sexual discrimination as one of the elements that may lead to a determination of social disadvantage and as previously stated, the SBA does not equate sexual discrimination to cultural bias.

Since you have utilized the one request for reconsideration allowed under SBA policy, a reapplication for the 8(a) program will not be accepted until six months from the date of this letter.

We hope you will avail yourself of the other SBA programs for which you are eligible.

Sincerely,

Joseph J. Linn, Jr.
William A. Clement, Jr.
Associate Administrator for
Minority Small Business

Attachment III



U.S. GOVERNMENT
SMALL BUSINESS ADMINISTRATION
WASHINGTON, D.C. 20516

JUL 31 1980

Ms. Margaret Shaffer
Paradigm, Inc.
8815 Quiet Stream Court
Potomac, Maryland 20854

Dear Ms. Shaffer:

This is in further reference to our letter of May 30, 1980, in which, upon reconsideration of your application for 8(a) program participation, SBA decided to uphold its initial decision.

We have recently been contacted by Ms. Linda Singer of the law firm of Goldfarb, Singer & Austern, who, on your behalf, expressed disagreement with the reconsideration decision. In light of Ms. Singer's objection, SBA has decided to again review your application and render a final decision on it.

Accordingly, we are rescinding our May 30 letter. Our review of your application will be expedited and we intend to notify you of our final decision within thirty days.

Sincerely,

Paul R. Brune
Acting William A. Clement, Jr.
Associate Administrator for
Minority Small Business

cc: Ms. Linda Singer
Goldfarb, Singer & Austern
918 16th Street, N.W.
Washington, D.C. 20006

Attachment IV



U.S. GOVERNMENT
SMALL BUSINESS ADMINISTRATION
WASHINGTON, D.C. 20416

FEB 21 1980

Mr. Maxine Mount
Building Services Unlimited, Inc.
130 West Fifth Street
Cincinnati, Ohio 45220

Dear Mr. Mount:

We regret to inform you that your firm has been declined for 8(a) program participation.

Current 8(a) program eligibility criteria, pursuant to Public Law 95-507, require, in part, that to qualify for program participation the individual upon whom eligibility is based must be determined to be socially disadvantaged. P.L. 95-507 defines socially disadvantaged individuals as those who have been subjected to racial or ethnic prejudice or cultural bias.

Building Services Unlimited does not meet this criterion because you, the individual upon whom eligibility is based, are not determined to be socially disadvantaged as defined by P.L. 95-507. Although you make a case for apparent sexual discrimination, P.L. 95-507 does not recognize sexual discrimination as one of these elements leading to social disadvantage and neither does the SBA equate sexual discrimination to cultural bias.

Should you wish your application to be reconsidered, SBA will accept only one such request. Within thirty calendar days from the date of this letter you must submit all information and documentation pertinent to overcoming each specific reason for decline which was not available at the time of decision to our Columbus District Office, 85 Marconi Boulevard, Columbus, Ohio, attention: District Director.

Sincerely,


William A. Clement, Jr.
Associate Administrator for
Minority Small Business



U.S. GOVERNMENT
SMALL BUSINESS ADMINISTRATION
WASHINGTON, D.C. 20416

JUL 21 1960

Ms. Maxine Mount, President
Building Services Unlimited, Inc.
120 West Fifth Street
Cincinnati, Ohio 45220

Dear Ms. Mount:

We regret to inform you that your request for reconsideration of your application has been declined for 8(a) program participation inasmuch as no new evidence has been submitted to establish that you meet the social and economic disadvantaged criteria, as defined for the purposes of this program. We feel that your request must be declined for the same reasons stated in my letter to you dated February 21, 1960.

Since you have utilized the one request for reconsideration allowed under Small Business Administration policy, a reapplication for the 8(a) program will not be accepted until six months from the date of this letter.

We hope you will avail yourself of the other SBA programs for which you are eligible.

Sincerely,

William A. Clement, Jr.
William A. Clement, Jr.
Associate Administrator for
Minority Small Business

Attachment VI

Bosco & Curry

ATTORNEYS AT LAW

1220 NINETEENTH STREET, N.W.
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*ADMITTED IN D.C. ONLY

December 24, 1981

The Honorable Michael Cardenas
Administrator
Small Business Administration
1441 L Street, N.W.
Washington, D.C. 20416

Dear Mr. Cardenas:

On behalf of our clients, the National Association of Women Federal Contractors, and pursuant to my telephone conversation with Donald Farrell, Esquire, of your General Counsel's office, we hereby request that you make a determination that women business owners, as a "socially disadvantaged" group, are eligible for the same presumptive participation in the Federal Government's business development procurement program as other groups already so designated by the Congress and the Small Business Administration ("SBA") under the Small Business Act, 15 U.S.C. 631 et seq, and that the appropriate committees of Congress be notified of this proposed action. As such, of course, women business owners would be subject to the same requirements and limitations as are applied by SBA to those groups already so designated (e.g., ownership and control tests, etc.).

To the extent existing SBA regulations set forth in 13 C.F.R. Part 124 concerning group eligibility for presumptive participation in such program may comply with the intent of Congress expressed in the enactment and legislative history of the Small Business Act, all supporting information regarding women in business as required by such regulations is already in the possession of SBA. In that connection, our clients also request that you furnish us with copies of all periodic reports by your predecessors at SBA on the status of women in business which was required by the Congress.

These actions by you will correct at last what our clients believe is a long history of improper administration of the business development program by your predecessors at SBA inconsistent with both the letter and the spirit of the Small Business Act.

CABLE BOSCOCURRY TELEX 19-7629

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The Honorable Michael Cardenas
December 24, 1981
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Legal Authority for SBA Determination of Presumptive Eligibility

The Administrator's authority for such group eligibility determination is clearly stated in 15 U.S.C. 637(a)(8). While the Congress itself had earlier refrained from making such a determination in the case of women business owners at the time of enactment of Public Law 95-507 on October 24, 1978, it clearly intended that SBA should have the authority to do so. Moreover, as to whether SBA should in fact exercise that authority, the Congressional intent clearly contemplated that your agency would conduct further necessary fact-gathering and analysis regarding the situation of women-owned businesses, beyond the substantial information already available at the time, to provide a basis for such an administrative determination.

The Law

The Congress in 1978 provided broader guidance to SBA than had existed theretofore with regard to those groups and individuals to be included in its "business development programs" by directing SBA "to foster business ownership by individuals who are both socially and economically disadvantaged", 15 U.S.C. 631(e)(2)(A).

Public Law 95-507 further stated as findings of Congress:

"(A) that the opportunity for full participation in our free enterprise system by socially and economically disadvantaged persons is essential if we are to obtain social and economic equality for such persons and improve the functioning of our national economy;

"(B") that many such persons are socially disadvantaged because of their identification as members of certain groups that have suffered the effects of discriminatory practices or similar invidious circumstances over which they have no control;

"(C) that such groups include, but are not limited to, Black Americans, Hispanic Americans, Native Americans, and other minorities;

"(D) that it is in the national interest to expeditiously ameliorate the conditions of socially and economically disadvantaged groups;

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"(E) that such conditions can be improved by providing the maximum practicable opportunity for the development of small business concerns owned by members of socially and economically disadvantaged groups;

"(F) that such development can be materially advanced through the procurement by the United States of articles, equipment, supplies, services, materials, and construction work from such concerns; ... " 15 U.S.C. 631(e)(1) (emphasis added)

With specific regard to the procurement programs administered by the various agencies and departments of the Federal Government, the law states further:

"Sec. 8. (a)(1) It shall be the duty of the Administration and it is hereby empowered, whenever it determines such action is necessary or appropriate -

* * *

"(C) to arrange for the performance of such procurement contracts by negotiating or otherwise letting subcontracts to socially and economically disadvantaged small business concerns for construction work, services, or the manufacture, supply, assembly of such articles, equipment, supplies, materials, or parts thereof, or servicing or processing in connection therewith, or such management services as may be necessary to enable the Administration to perform such contracts.

* * *

"(4) For purposes of this section, the term 'socially and economically disadvantaged small business concern' means any small business concern-

"(A) which is at least 51 per centum owned by one or more socially and economically disadvantaged individuals; or, in the case of any publicly owned business, at least 51 per centum of the stock of which is owned by one or more socially and economically disadvantaged individuals; and

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The Honorable Michael Cardenas
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"(B) whose management and daily business operations are controlled by one or more of such individuals.

"(5) Socially disadvantaged individuals are those who have been subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities.

"(6) Economically disadvantaged individuals are those socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged. In determining the degree of diminished credit and capital opportunities the Administration shall consider, but not be limited to, the assets and net worth of such socially disadvantaged individual.

"(7) No small business concern shall be deemed eligible for any assistance pursuant to this subsection unless the Administration determines that with contract, financial, technical, and management support the small business concern will be able to perform contracts which may be awarded to such concern under paragraph (1)(C) and has reasonable prospects for success in competing in the private sector." 15 U.S.C. 637 (emphasis added)

As to the question of which other groups in American society give rise to social disadvantage merely by virtue of individual membership therein, in addition to those groups specified in the Act, Congress provided as follows:

"(8) All determinations made pursuant to paragraph (5) with respect to whether a group has been subjected to prejudice or bias shall be made by the Administrator after consultation with the Associate Administrator for Minority Small Business and Capital Ownership Development. All other determinations made pursuant to paragraphs (4), (5), (6), and (7) shall be made by the Associate Administrator for Minority Small Business and Capital Ownership Development under the supervision of, and responsible to, the Administrator." Id. (emphasis added)

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Finally, in its enactment of Public Law 95-507, Congress did not, of course, revoke any existing civil rights requirements previously imposed on SBA by statute or the Constitution, such as the prohibition against discrimination based on "sex" nor the specific mandate to the Administrator which is of particular significance for women business owners:

"In carrying out the programs administered by the Small Business Administration including its lending and guaranteeing functions, the Administrator shall not discriminate on the basis of sex or marital status against any person or small business concern applying for or receiving assistance from the Small Business Administration." 15 U.S.C. 633 (b) (1) (emphasis added)

The Congressional Intent

Congress has provided SBA and small business owners in the United States with extensive indications of the legislative history and its intent in enacting Public Law 95-507 by means of the Committee Print which was published in April 1980 by the Committee on Small Business of the House of Representatives, entitled "Government Procurement From Small and Small Disadvantaged Businesses (Public Law 95-507 and Accompanying Reports)"

The Honorable Neal Smith, Chairman of the House Committee on Small Business, in his Letter of Transmittal on April 16, 1980, cited "the public interest in this law and the tremendous demand for copies of the statute and the accompanying Congressional Reports", and stated:

"Public Law 95-507, which originated in the House as H.R. 11318...was signed by the President on October 24, 1978, and represents the most extensive revision of small business procurement programs enacted in the last twenty-five years. Included among its provisions are amendments to the Small Business Act affecting the section 8(a) program for the disadvantaged...."

As the Report of the Conference Committee stated, H.R. 11318 was the final product of a series of bills which had been considered by the House Small Business Committee's Subcommittee on Minority Enterprise and General Oversight. The Subcommittee's Report on Women in Business (Report No. 95-604, September 15, 1977), which was based on a series of hearings on "Women in Business" in the spring of 1977, summarized the facts presented to it as follows:

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"The Subcommittee is in receipt of numerous complaints from female entrepreneurs which indicate that their entrance into the business world is marked with a myriad of barriers resulting from both past and present sex discrimination..." (emphasis added)

Based on those facts, the Subcommittee made these findings:

"That women, as a class of individuals, have been and continue to be excluded from equitable participation in our economy as business owners.

"That this lack of access to our business system is the direct and indirect result of sex discrimination."

"That the most severe handicap to women is social prejudice, often subtle and difficult to verbalize, but having the cumulative effect which unmistakably hampers women assuming their rightful place in the economy."

"If women are identified as a group which is presently suffering from past inequities, we must resolve to afford them special assistance in an attempt to expeditiously compensate for the past."

"That the Government should utilize its vast purchasing power to assist female owned businesses as well as small and minority business...viewing the female and minority population as a virtually untapped reservoir of talent, creativity and ingenuity which we simply cannot afford to ignore any longer." (emphasis added)

Finally, the Subcommittee stated in its conclusion:

"That the 8(a) program administered by the Small Business Administration represents the most significant effort of the Federal Government to channel Federal contracts to the 'economically or socially disadvantaged.' While we agree that women in business can establish 'disadvantage' due to sex discrimination, we would not urge their automatic inclusion in this program unless...Small Business Administration undertake the following:

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The Honorable Michael Cardenas
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- (a) A reevaluation of eligibility criteria which would result in accepting applicants who, among other things, can demonstrate a potential for business success;
- (b) A review of supportive services and contract requirements needed to provide an adequate level of assistance to all program participants;
- (c) A study to determine if benefits derived from 8(a) assistance can be reasonably calculated to advance the status of women in business; and
- (d) The development of appropriate safeguards to insure that insofar as is possible, the program will not be exploited by unscrupulous individuals, or utilized by those not intended to benefit from the program." (emphasis added)

The Report adopted by the Conference Committee (Report No. 95-959, March 13, 1978), in the section "The Need for the Legislation", addressed the "SBA 8(a) Program". It first set forth "the profile of participating firms by the ethnicity and sex of the owners" (emphasis added) containing the following information:

OWNERSHIP BY SEX

<u>Sex</u>	<u>Number of Concerns</u>	<u>Percent by Sex</u>
Male	1,422	96.0
Female	60	4.0

After then dealing with various problems which had been experienced under the 8(a) program, the Conference Report returned to the question of participation by disadvantaged groups in addition to those explicitly so designated:

"There is sufficient discretion under the provisions of the proposed paragraph (5) of section 8(a) and section 201 of the bill to allow SBA to designate any other additional minority group of persons it believes should be afforded the presumption of social and

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The Honorable Michael Cardenas
December 24, 1981
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economic disadvantage. However, before SBA exercises its discretion pursuant to this paragraph, your Committee believes the agency should compile such evidence as may be necessary to support its conclusion, and that such materials should be presented to this Committee for its review prior to the administration's taking final action." (emphasis added)

The Report then discussed the respective procedures applying to group and individual eligibility and concluded as follows:

"When implementing the eligibility criteria created by this subsection, the committee intends that SBA give most serious consideration to, among others, women business owners.

The Committee notes that sex discrimination, whether overt or subtle, can and does result in business impediments which are not generally common to all small business owners. Further, sex discrimination, since it involves interpersonal relationships, must be considered as resulting in social disadvantage within the meaning of the subsection.

Therefore, in determining whether or not a particular woman is socially disadvantaged within the meaning of the subsection, SBA should seek not only demonstrable signs of sex discrimination, but more important, the cumulative result of subtle discrimination which can and does become manifest in a number of differing ways.

The committee fully realizes that the eligibility criteria created pursuant to paragraphs (5) and (6) constitute an untried approach for program eligibility. Therefore, while we believe such an approach reasonable, we lack sufficient empirical data to fully assess the equity of its results. Therefore, your committee directs the SBA to report to the Subcommittee on Minority Enterprise and General Oversight 6 months after the publication of the regulations and at 6-month intervals thereafter for 2 years after the enactment of H.R. 11318 detailed reports indicating the number, ethnicity and sex of the owners of 8(a) firms, corresponding information for those denied 8(a) eligibility and its recommendation and that of the administration as to

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The Honorable Michael Cardenas
December 24, 1981
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whether the eligibility criteria established by this bill continue to be appropriate and reasonable.

Your Committee, in addition, will continue to give its uppermost serious consideration to the special problems of female entrepreneurs." (emphasis added)

Finally, in the "Joint Explanatory Comment of the Committee of Conference" the conferees amplified somewhat the views of "the managers ... of the House and the Senate" regarding "the accompanying conference report." The statement made clear that the Congress considered "cultural bias" factually and legally equivalent to "racial or ethnic prejudice" as a cause of "social disadvantage"

"... The Conferees realize that other Americans may also suffer from social disadvantage because of cultural bias. For example, a poor Appalachian white person who has never had the opportunity for a quality education or the ability to expand his or her cultural horizons, may similarly be found socially disadvantaged, provided that the conditions leading to such disadvantage are beyond the ability of the person to control." (emphasis added)

The Congress made clear, however, that while the absence of a quality education because of membership in a particular group may be indicative of "social disadvantage," the fact that individual members of an otherwise disadvantaged group manage to achieve such an education or business experience, may not be used by SBA to deny eligibility:

"The standards must not deny admission to the 8(a) program to applicants merely because they have managed to acquire a quality education. Indeed, such an education may be a prerequisite for the development of a viable business. Nor shall past or present employment by itself be used as criteria for denial of an applicant's admission to the program. Applicants who have managed in this manner to prepare themselves to successfully participate in the free enterprise system should not be denied admission to the 8(a) program for business development for having done so."

Congress also articulated its views regarding the relationship between social disadvantage and economic disadvantage which was expressed as a kind of two-tiered approach:

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The Honorable Michael Cardenas
December 24, 1981
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"With respect to economic disadvantage, the Conferees agree that an economically disadvantaged person is one who is socially disadvantaged and whose ability to compete in the economy is impaired, due to lack of capital and credit, as compared to others in the same business area who are not socially disadvantaged. According to the substitute language a person must be found socially disadvantaged before a determination of economic disadvantage can be made. The Conferees intend that the assets and net worth of the applicant will be evaluated along with other factors, on the basis of the applicant's business as compared to others in the same field who are suffering from social impediments."

The Conferees concluded their discussion of the 8(a) program by describing various administrative mechanisms available to SBA and reiterated the expanding Congressional intent to "increase SBA's ability to develop disadvantaged firms."

Administrative Findings and Actions Regarding Other Disadvantaged Groups.

Subsequent to enactment of Public Law 95-507 by the Congress, SBA has taken the following actions with regard to the presumptive eligibility of disadvantaged groups:

- (1) made a determination that "Asian-Pacific Americans" constitute a "socially disadvantaged group" and are therefore eligible for presumptive eligibility under section 8(a), House Report No. 96-998, May 16, 1980, p. 2. (The date of the SBA action is not reported.) ✓;

*/ We do not address here the question of whether that administrative determination by your predecessors at SBA was made in accordance with the then-applicable regulations and internal guidelines. Although the Congress, on July 2, 1980, added that group to the statutorily-designated disadvantaged groups, the question of administrative regularity may nevertheless be pertinent to the issue of possible agency discrimination discussed below at pp. 12.

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The Honorable Michael Cardenas
December 24, 1991
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- (2) published an Interim Rule and Notice of Proposed Rulemaking on the "Definition of Social Disadvantaged", Federal Register, Volume 45, No. 232, December 1, 1980, and various internal administrative guidelines, operating rules, and legal interpretations pursuant to those regulations; ^{*/}
- (3) found in at least seven specific instances that individual women business owners, merely by virtue of membership in that group and no other racial or ethnic group, suffered sufficient social and economic disadvantage to be deemed eligible to participate in the 8(a) program;
- (4) published regulations regarding graduation and termination requirements, entrance and exit criteria, etc., which address each of the standards called for by the House Small Business Committee's Subcommittee on Minority Enterprise and General Oversight as prerequisite to a determination of women in business as a designated disadvantaged group; Federal Register, Vol. 46, No. 255, pp. 57266-57272, November 23, 1981. November, 1981.

Finally, no less an administrative authority than the President of the United States, after review of the "findings of the Interagency Task Force on Women Business Owners and congressional findings" (emphasis added), issued Executive Order 12138 on May 18, 1979, officially recognizing that women-owned businesses as a group suffer such social and economic disadvantages ("the many obstacles facing women entrepreneurs").

^{*/} We do not address here the question of whether such rulemakings, administrative guidelines and interpretations by your predecessors at SBA complied with the Act or the clear intent of Congress, though that question may relate to the issue of possible agency discrimination discussed below at pp.12.

Bosco & Currey

The Honorable Michael Cardenas
December 24, 1981
Page 12

Conclusion and Requested Actions

For SBA to continue to require individual women-owned businesses to qualify for initial eligibility on a case-by-case basis constitutes an unnecessary additional burden on these businesses imposed by the Federal Government itself. As such, perpetuation of this administrative practice in the face of the current state of knowledge may well constitute a violation of SBA's statutory responsibilities not to discriminate "on the basis of sex or marital status." Indeed, it appears that the primary reason SBA has granted initial eligibility in several of the cases referred to above was the common factor that each women-owned business had initiated legal action against your predecessors at SSA. While the final results may have served justice in those cases, it was achieved only after considerable, and unnecessary, costs to those small businesses. This situation--which inevitably discourages innumerable other women-owned businesses from even attempting to obtain eligibility--must end under this Administration which is pledged to freeing up this nation's tremendous entrepreneurial resources.

Moreover, in view of current budgetary constraints, the wisdom, utility and cost-effectiveness of the 8(a) program is accentuated because it does not require the expenditure of significant additional Federal funds, but simply ensures that the private sector business opportunities generated by those funds which are to be expended anyway are shared by all qualified small businesses, and particularly those within the socially and economically disadvantaged groups.

The stage is now set and the administrative, legal, and factual foundations are now in place enabling--indeed, requiring--SBA to take this next logical and timely step in tapping for the Federal Government and for American society that "... reservoir of talent, creativity and ingenuity which we simply cannot afford to ignore any longer."

On the basis of the foregoing, therefore, we hereby request on behalf of our clients that you undertake the following immediate actions:

1. Furnish us with copies of the initial report to Congress, and all subsequent six-month reports containing SBA's empirical data relating to women-owned businesses, and/or other reports to Congress containing equivalent information;

Bosco & Curry

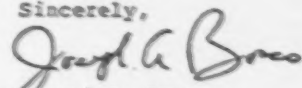
The Honorable Michael Cardenas
December 24, 1981
Page 13

2. Take all necessary preparatory actions prior to publishing a formal determination of presumptive eligibility for women-owned businesses to participate in the 8(a) program on the same basis as other designated disadvantaged groups;

3. Inform the appropriate committees of Congress that the above actions are being undertaken by SBA in preparation for the "final action" of formal publication of such determination.

We look forward to your expeditious positive action in making this long over-due determination, and we and our clients stand ready to assist you in any way toward that end.

Sincerely,


Joseph A. Bosco

JAB/stv



U.S. GOVERNMENT
SMALL BUSINESS ADMINISTRATION
WASHINGTON, D.C. 20416

JAN 12 1982

Joseph A. Bosco, Esq.
Bosco & Curry
1220 Nineteenth Street, N.W.
Washington, D.C. 20036

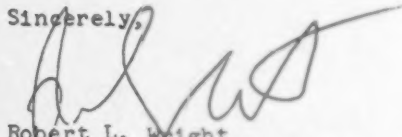
Dear Mr. Bosco:

This will acknowledge your December 24, 1981, letter to Mr. Cardenas, Administrator of the Small Business Administration, which requested the designation of "women business owners" as a socially disadvantaged group for the purposes of Section 8(a) Program eligibility determinations. This request is received by SBA pursuant to the provisions of 13 CFR Section 124.1-1(c)(3)(iv).

We are in the process of reviewing your request to determine whether it is appropriate under this regulation, and, if so, whether it satisfies the regulatory requirements for "an adequate showing . . . that the group has suffered chronic racial or ethnic prejudice or cultural bias. . . ."

These determinations will be completed in the near future. We will advise you of them at that time.

Sincerely,



Robert L. Wright
Associate Administrator for Minority Small
Business and Capital Ownership Development

Bosco & Curry

ATTORNEYS AT LAW

1220 NINETEENTH STREET, N.W.
WASHINGTON, D.C. 20036
(202) 293-1822

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RICHARD LANDFIELD*
WILLIAM W. BECKER
ROY E. GREEN*
HAROLD C. PETROVITZ*

*ADMITTED IN D.C. ONLY

January 14, 1982

The Honorable Michael Cardenas
Administrator
Small Business Administration
1441 L Street, N.W.
Washington, D.C. 20416

Dear Mr. Cardenas:

We have received a letter of January 12 from Associate Administrator Robert L. Wright acknowledging our December 24 letter to you and promising a timely determination of our request.

Mr. Wright's description of the "process" by which our request is being reviewed cites the SBA regulations but is silent on the acts and intent of Congress which govern SBA authority in this area. While it is our position that SBA already has in its possession all the detailed information necessary for this determination, even under your own regulations, the intended SBA approach does raise the question of the validity of those regulations, which was alluded to in our December 24 letter. Further, Mr. Wright's letter neither responds nor refers to the request contained in our letter for that very information regarding women in business which was presumably prepared by SBA at the direction of the Congress. Therefore, we are today filing by separate letter (copy enclosed) a Freedom of Information Act request for all materials collected or prepared by SBA concerning the status of women in business, whether or not actually submitted to the Congress. In addition, pursuant to that Act, we are also requesting copies of the administrative determination by SBA regarding the presumptive eligibility of Asian-Pacific Americans in the "8(a)" program and all materials in support thereof as cited in HR 96-998 (and also referred to in our December 24 letter).

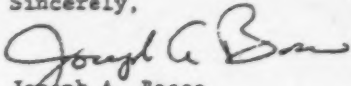
We reiterate our hope and expectation that this Administration will act on our request--not by perpetuating past SBA attitudes in this area--but rather, in a positive spirit of fundamental fairness, willingness to comply faithfully with

Bosco & CURRY

The Honorable Michael Cardenas
January 14, 1982
Page 2

the letter and intent of the law, and a desire to utilize the 8(a) program in a vigorous effort to release the creative entrepreneurial forces of all disadvantaged individuals and groups in American society. We pledge again our willingness to work with you and your staff toward that end.

Sincerely,


Joseph A. Bosco

JAB:db
Enclosure

Bosco & Curry

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HAROLD C. PETROVITZ*

*ADMITTED IN D.C. ONLY

January 14, 1982

Mr. Nick Kalcounos
Freedom of Information Office
Room 720-A
Small Business Administration
1441 L Street, N.W.
Washington, D.C. 20416

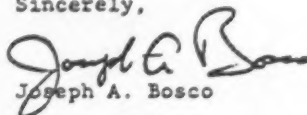
Dear Mr. Kalcounos:

Pursuant to the Freedom of Information Act, 5 U.S.C. s. 552, we hereby request that you furnish us with copies of all materials collected or prepared by the Small Business Administration concerning the status of women in business, whether or not such materials were submitted to the Congress. In addition, pursuant to said Act, we also request copies of the administrative determination by SBA regarding the presumptive eligibility of Asian-Pacific Americans for participation in the SBA business development "8(a)" program and all materials in support thereof as cited in HR 96-998.

In the event it is your position that disclosure of any of these materials is impermissible under said Act, we request that you delete only those portions that you believe cannot be disclosed and that you furnish us with a detailed list of the type of information so deleted and the reason(s) therefor.

Thank you for your assistance in this matter.

Sincerely,


Joseph A. Bosco

JAB:db

CABLE: BOSCOCURRY TELEX 19-7029



U.S. GOVERNMENT
SMALL BUSINESS ADMINISTRATION
WASHINGTON, D.C. 20416

JAN 25 1982

Mr. Joseph A. Bosco
Bosco & Curry
1220 Nineteenth Street, N.W.
Washington, D.C. 20036

Dear Mr. Bosco:

This office is in receipt of your recent Freedom of Information Act request.

The portion of your request referring to the status of women in business has been referred to the Women's Business Enterprise Division for response. You will receive the information which you have requested directly from that office. We have enclosed the documents which you seek pertaining to the eligibility of Asian-Pacific Americans for participation in the 8(a) Program. The notice in the Federal Register served as the administrative determination; we have enclosed copies of the comments which this Agency received regarding that notice.

Please feel free to contact Ms. Lisa Babcock or me on 653-6460 if you should have any questions on this matter.

Sincerely,

A handwritten signature in cursive script, reading "Nicholas Kalcounos".

Nicholas Kalcounos
Director
Freedom of Information
Privacy Acts Division

Enclosure



U.S. GOVERNMENT
SMALL BUSINESS ADMINISTRATION
WASHINGTON, D.C. 20416

February 2, 1982

Joseph A. Bosco
Bosco and Curry
Attorneys at Law
1220 Nineteenth St., N. W.
Washington, D. C. 20036

Dear Mr. Bosco:

I am responding to your letter of January 14, 1982 directed to Mr. Nick Kalcounos.

The first paragraph of your letter seeks "copies of all materials collected or prepared by the Small Business Administration concerning the status of women in business, whether or not such materials were submitted to the Congress." Because this office does not have in its files all matters dealing with women in business and because many files concerning women in business are disbursed throughout this agency, I need further particularization of the exact subject matter you desire so that we may respond correctly.

Looking forward to hearing from you and working with you in the future;

Sincerely,

A handwritten signature in cursive script, reading "Carolyn D. Schoenberg".

Carolyn D. Schoenberg
Director
Women's Business Enterprise Division

cc: Nick Kalcounos
Freedom of Information Office



U.S. GOVERNMENT
SMALL BUSINESS ADMINISTRATION
WASHINGTON, D.C. 20416

JAN 27 1982

Mr. Joseph A. Bosco
Bosco & Curry
1220 Nineteenth Street, N.W.
Washington, D.C. 20036

Dear Mr. Bosco:

This letter is in further reference to your Freedom of Information Act request. Enclosed you will find the May 30, 1979, notice which appeared in the Federal Register and which was entitled, "Minority Group Consideration; Asian Pacific Americans." We trust that this will be of assistance to you.

Sincerely,

A handwritten signature in cursive script, reading "Nicholas Kalcounos".

Nicholas Kalcounos
Director
Freedom of Information
Privacy Acts Division

Enclosure

economic injury until the close of business on February 18, 1980, at:

Small Business Administration, District Office, 477 Michigan Avenue—McNamara Building, Room 315, Detroit, Michigan 48226.

or other locally announced locations.

(Catalog of Federal Domestic Assistance Program Nos. 59002 and 59008.)

Dated: May 16, 1979.

A. Vernon Weaver,
Administrator.

(FR Doc. 79-10790 Filed 5-29-79; 9:45 am)
BILLING CODE 8025-01-4

[License No. 02/02-0361]

Wood River Capital Corp., Issuance of a License to Operate as a Small Business Investment Company

On February 12, 1979, a Notice was published in the Federal Register (44 FR 8046) stating that Wood River Capital Corporation, 645 Madison Avenue, New York, New York 10022, had filed an application with the Small Business Administration (SBA) pursuant to Section 107.102 of the SBA Rules and Regulations governing small business investment companies (13 CFR 107.102 (1978)), for a license to operate as a small business investment company (SBIC).

Interested parties were given until the close of business February 27, 1979, to submit their comments. No comments were received.

Notice is hereby given that, having considered the application and all other pertinent information, SBA on May 9, 1979, issued License No. 02/02-0361 to Wood River Capital Corporation, pursuant to Section 301(c) of the Small Business Investment Act of 1958, as amended.

(Catalog of Federal Domestic Assistance Program No. 59.011, Small Business Investment Companies.)

Dated: May 24, 1979.

Peter F. McNeish,
Deputy Associate Administrator for Finance and Investment

(FR Doc. 79-10790 Filed 5-29-79; 9:45 am)
BILLING CODE 8025-01-4

Region III Advisory Council Executive Board Public Meeting

The Small Business Administration Region III Advisory Council Executive Board will hold a public meeting at 10:00 a.m., Thursday, June 21, 1979, in Suite 400—East Lobby, One Dale Cynwyd Plaza, Dale Cynwyd, Pennsylvania, to discuss such matters as may be

presented by members, staff of the U.S. Small Business Administration, or others present.

For further information, write or call Daniel P. Hanson, III, Regional Director, U.S. Small Business Administration, Suite 645—West Lobby, One Dale Cynwyd Plaza, Dale Cynwyd, Pennsylvania 19006—(215) 265-0880. Dated: May 24, 1979.

K. Drew,

Deputy Associate for Advisory Councils

(FR Doc. 79-10790 Filed 5-29-79; 9:45 am)

BILLING CODE 8025-01-4

Minority Group Consideration; Asian Pacific Americans

Pursuant to the provisions of section 8(a) of the Small Business Act, 15 U.S.C. 637(a) as amended by Pub. L. 95-507, and 13 CFR 124.1-1(c)(3)(ii)(A), notice is hereby given that the Small Business Administration (SBA) has received a request that it consider the Asian Pacific Americans, including Japanese Americans, Chinese Americans, Philippine Americans, Vietnamese Americans, Korean Americans, and Samoan Americans (hereinafter group) to be a minority group which has members who are socially disadvantaged because of their identification as members of the group, for the purpose of eligibility for SBA's section 8(a) program.

SBA shall receive comments and information from the public, on or before June 28, 1979, which tends to show:

(1) If the group has suffered the effects of discriminatory practices or similar invidious circumstances over which its members have no control;

(2) If the group has generally suffered from prejudice or bias;

(3) If such conditions have resulted in economic deprivation for the group of the type which Congress has found exists for the groups named in Pub. L. 95-507; and

(4) If such conditions have produced impediments in the business world for members of the group over which they have no control and which are not common to all small business people.

All such comments and information should be submitted to:

Mr. William Clement, Associate Administrator, Minority Small Business and Capital Ownership Development, U.S. Small Business Administration, 1441 L Street, NW, Washington, D.C. 20518

Subsequent to the close of the receipt of information on this matter, the SBA will publish its decision on the group's request in the form of a Notice in the

Federal Register, pursuant to the provisions of 13 CFR 124.1-1(c)(3)(ii)(D).

Dated: May 24, 1979.

William A. Clement,

Associate Administrator, Minority Small Business and Capital Ownership Development, Small Business Administration

(FR Doc. 79-10791 Filed 5-29-79; 9:45 am)
BILLING CODE 8025-01-4

DEPARTMENT OF STATE

Agency for International Development

(Revision of Redlegation of Authority Nos. 5.21, 23.7, 26.3, 28.25, 40.12, 41.8, 75.4, 90.18, and 100.5)

Redlegation of Authorities to the Field: Latin America and the Caribbean Region

Section I. Definition.

AID Missions and Offices.

AID Missions and Offices subject to this redlegation of authorities shall be the AID Missions or Offices located in Brazil, Ecuador, and Uruguay.

Section II. Authorities.

A. Implementing Authorities.

Authority to negotiate, execute, and implement, in accordance with applicable statutes and regulations, all loan, grant, and guaranty agreements, and amendments thereto, to their respective countries, whether herebefore or hereafter authorized, including authority:

1. To sign project agreements, trust fund agreements, and grant agreements with foreign governments, foreign government agencies, and international organizations having a membership consisting primarily of such foreign governments;

2. To sign Project Implementation Orders (PIO's or PPA's); and

3. To approve borrower/grantee contracts financed in whole or in part by an AID loan or grant; provided that this approving authority shall be limited to contracts not to exceed \$30,000.

B. Waiver Authorities.

Selected Free World

Authority to waive, in accordance with applicable statutes and regulations, including the terms of Delegation of Authority No. 40 (AID Handbook 5) and the criteria prescribed by Supplement B of AID Handbook 1, U.S. Source, origin or nationality requirements, to permit procurement of goods and services, other than transportation services, in countries included in AID Geographic Code 191 (Selected Free World) and the cooperating country, when the cost of goods and services does not exceed

686

Bosco & Curry

ATTORNEYS AT LAW

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*ADMITTED IN D.C. ONLY

January 29, 1982

Mr. Nicholas Kalcounos
Director
Freedom of Information
Privacy Acts Division
Small Business Administration
Washington, D.C. 20416

Dear Mr. Kalcounos:

Thank you for your January 27 letter enclosing a copy of the Federal Register notice we requested. We further ask that you please furnish us with a copy of the "request" referred to in the notice which served as the basis for that notice.

Thank you for your assistance.

Sincerely,

Joseph A. Bosco

JAB:db



U.S. GOVERNMENT
SMALL BUSINESS ADMINISTRATION
WASHINGTON, D.C. 20416

FEB 2 1982

Mr. Joseph A. Bosco
Bosco & Curry
Attorneys at Law
1220 Nineteenth Street, N.W.
Washington, D.C. 20036

Dear Mr. Bosco:

This office is in receipt of your January 29, 1982 letter concerning your Freedom of Information Act request.

The letter which you are seeking was enclosed in our January 25, 1982, response to you. The May 22, 1979, letter from the Japanese American Citizens League initiated the notice in the Federal Register that Asian Pacific Americans be recognized as a minority group. For your convenience we have enclosed an additional copy of that letter.

Should you have any further questions on this matter, please feel free to contact Ms. Lisa Babcock or me on 653-6460.

Sincerely,

A handwritten signature in cursive script, reading "Nicholas Kalcounos", is written over the typed name.

Nicholas Kalcounos
Director
Freedom of Information
Privacy Acts Division

Enclosure



WASHINGTON OFFICE
JAPANESE AMERICAN CITIZENS LEAGUE
1730 RHODE ISLAND AVENUE, N.W.
WASHINGTON, D.C. 20036
(202) 223-1240

RONALD K. IKEMORI
WASHINGTON OFFICE SECRETARY

NATIONAL HEADQUARTERS, JACL
1801 SUTTER STREET
SAN FRANCISCO, CALIFORNIA 94115
(415) 921-8224

May 22, 1979

Mr. William A. Clement, Jr.
Associate Administrator for
Planning and Evaluation
Capital Development and
Small Business Administration
201 L Street, N.W.
Washington, D.C. 20540

RE: Certification of Asian Pacific Americans as a socially
and economically disadvantaged group.

Dear Mr. Clement,

This is a request for the certification of Asian Pacific Americans as a group that has suffered and continues to suffer racial and ethnic prejudices; as such, Asian Pacific Americans should be included among groups identified as socially disadvantaged in section 124.1-1(c)(3)(1) 13 CFR Part 124, SBA Small Business and Capital Ownership Development Program, pursuant to the authority conveyed to you by Public Law 95-507.

Extensive documentation proving the legitimacy of Asian Pacific Americans as a socio-economically disadvantaged group is presently being compiled and will be submitted forthwith. In this current submittal, we ask that the following facts be considered.

A partial list of discriminatory legislation against Asian Pacific Americans is exemplified by the following examples:

1. In 1865, Chinese American children are denied the right to education in the California public schools.
2. In 1879, the California State Constitution prohibits employment of Chinese Americans by any private corporation or governmental agency.
3. In 1882, 1907, and 1930, Chinese, Japanese, and Filipinos respectively are excluded from immigration to the United States.

4. In 1913, Chinese and Japanese are prohibited from owning land.
5. In 1942, 110,000 Japanese Americans are sent to concentration camps in the United States depriving them of their jobs, their businesses, and their homes, based solely on race and without due process of law.

Based on a study issued by the United States Department of Commerce using data from a special census of minority-owned businesses in the United States, the low status of Asian Pacific American enterprises can be seen from the following:

1. Asian American businesses are predominantly sole proprietorship without paid employees and have low annual receipts. Nearly fifty-two (52) percent of the Asian American proprietorships had less than \$5,000 in gross annual receipts. Nearly ninety-five (95) percent had less than \$25,000 annual gross receipts.
2. Asian American firms are only meagerly involved in the wholesaling, manufacturing, and construction industries. Of about 1,700 firms in manufacturing, fifty-eight (58) percent were of sole proprietorship, were without paid employees, and had annual gross receipts averaging only \$15,000; these mostly are labor-intensive firms engaging in food manufacturing and the garment industry.

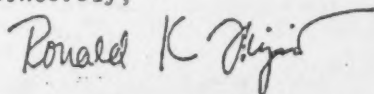
Data from the United States Bureau of the Census show the proportion of Asian Pacific Americans in the low status, low income occupation to be two and three times that of white Americans in the four metropolitan areas where more than one-half of the Asian Pacific American populations reside: San Francisco, Los Angeles, Chicago, and New York. A study sponsored by the United States Equal Employment Opportunity Commission using EEO-1 data supplied by employers themselves, shows the clustering of Asian Pacific Americans in service worker and clerical occupations, their absence from managerial ranks, and their absence from the construction and mainstream manufacturing industries. Based on Census data, Asian American workers with four or more years of college earned fifty (50) percent to eighty (80) percent of white male earnings in the same four metropolitan areas. Asian American females earned forty-five (45) percent to fifty-five (55) percent of white male earnings. The income disparities also persist among

those with lesser educational attainment. From regression analyses of income as accounted for by factors such as education, labor market area, labor experience, hours and weeks work, it is concluded that the income disparities most likely are due to employment and income discrimination.

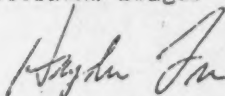
In view of the above evidence, we respectfully request that Asian Pacific Americans be included among those identified as socially and economically disadvantaged groups and therefore entitled to federal government assistance for minority enterprises.

Again, additional extensive documentation will be submitted forthwith.

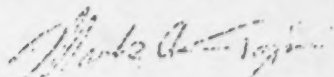
Sincerely,



Ronald Ikejiri, Washington
Representative, Japanese American
Citizens League



Hayden Lee, Executive Director
Organization of Chinese Americans



Mark Tajima, Washington Coordinator
Pacific/Asian Coalition

enclosure

c.c. Mr. A. Vernon Weaver
Mr. William Mauk



U.S. GOVERNMENT
SMALL BUSINESS ADMINISTRATION
WASHINGTON, D.C. 20416

FEB 10 1982

Joseph A. Bosco, Esq.
Messrs. Bosco & Curry
1220 Nineteenth Street, N.W.
Washington, D.C. 20036

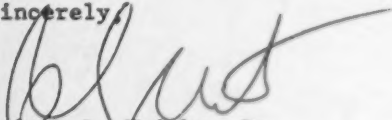
Dear Mr. Bosco:

This is to acknowledge receipt of your January 14, 1982, letter to Mr. Cardenas and its enclosure, which is a copy of your letter of the same date to Mr. Kalcounos requesting certain materials under the Freedom of Information Act.

I appreciate the initiative and thoroughness you have brought to bear on the complicated question you are asking us to consider, regarding the possibility that women in business, as a group, are entitled to Public Law 95-507's presumptions. I assure you that we are doing our best to respond in the same spirit while acquitting our administrative responsibilities.

As we move forward in this inquiry, I look forward to a pleasant and constructive effort on both of our parts.

Sincerely,



Robert L. Wright, Jr.
Associate Administrator
for Minority Small Business

Bosco & Curry

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1220 NINETEENTH STREET, N.W.
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February 15, 1982

Mr. Nicholas Kalcounos
Director
Freedom of Information
Privacy Acts Division
Small Business Administration
Washington, D.C. 20416

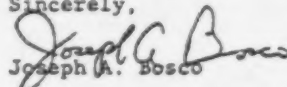
Dear Mr. Kalcounos:

Thank you for your responses to our request for information relating to S.B.A. actions affecting the 8(a) eligibility of Asian-Pacific Americans.

As for our F.O.I.A. request relating to women in business, you are listed as having been sent a copy of the February 2 letter to us from Ms. Carolyn Schoenberg to whom you referred the matter.

Enclosed for your information is a copy of our December 24 letter to Administrator Cardenas requesting an administrative determination that women in business constitute a "socially disadvantaged" group as that term applies to the S.B.A. 8(a) program. The information we seek is described on pages 7 through 9 of that letter. If the Women's Business Enterprise Division of S.B.A. does not possess such information, we ask that you refer this request to the appropriate offices within S.B.A. Thank you for your assistance.

Sincerely,


Joseph A. Bosco

JAB:db
Enclosure

cc: Robert L. Wright, Jr.
Associate Administrator for
Minority Small Business

The Administrator

CABLE: BOSCOCURRY TELEX: 19-7629



U.S. GOVERNMENT
SMALL BUSINESS ADMINISTRATION
WASHINGTON, D.C. 20416

FEB 25 1982

Mr. Joseph A. Bosco
Bosco & Curry
1220 Nineteenth Street, N.W.
Washington, D.C. 20036

Dear Mr. Bosco:

This acknowledges receipt of your February 15, 1982, Freedom of Information Act request regarding women in business and the 8(a) program.

Ms. Carolyn Schoenberg, Director of the Women's Business Enterprise Division is out of the office on travel until Monday, March 1, 1982. When she returns, we will discuss your further request with her to determine whether the information you seek is available.

Should you have any questions regarding the above, please feel free to contact Jan Snare of my staff, or me, on 653-6460.

Sincerely,

A handwritten signature in cursive script, reading "Nicholas Kalcounos".

Nicholas Kalcounos
Director, Freedom of Information/
Privacy Acts Office



U.S. GOVERNMENT
SMALL BUSINESS ADMINISTRATION
WASHINGTON, D.C. 20416

MAR 4 1982

Mr. Joseph A. Bosco
Bosco & Curry
Attorneys At Law
1220 Nineteenth Street, N.W.
Washington, D. C. 20036

Dear Mr. Bosco:

This is in response to your letter of January 14, 1982, addressed to former Administrator Michael Cardenas.

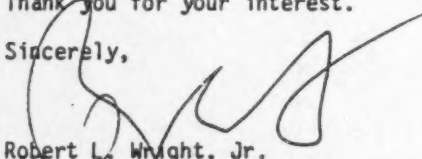
It is our position that all petitions for group designation must comply with the requirements set forth in the rules and regulations which govern our Agency. Accordingly, we are in the process of considering basic procedural issues raised by your petition.

In response to your Freedom of Information Act request for "all materials collected or prepared by the Small Business Administration concerning the status of women in business," it is my understanding that the Office of Women's Business Enterprise has communicated with your office in order to obtain a more specific listing of the subject areas of the requested documents.

You have also requested all materials in support of the administrative determination of group eligibility of Asian Pacific Americans. We, too, require a more detailed list. I have enclosed, for your information, an index of all submissions on the Asian Pacific American eligibility determination maintained in the files of the Office of Minority Small Business and Capital Ownership Development. Should you so desire, you or your representative may peruse the documents during SBA's business hours and make a determination as to those documents you wish copied. Otherwise, merely indicate in writing the items desired, and we will calculate the appropriate fee to be paid by you prior to our transmittal of the documents.

Thank you for your interest.

Sincerely,



Robert L. Wright, Jr.
Associate Administrator
for Minority Small Business

Enclosure

SUBMISSION ON ASIAN PACIFIC AMERICANS

- 1 Letter - Organization of Chinese Americans
- 2 Publication - Gangs in NY's Chinatown - Sung
- 3 Publication - Proceedings of 76 Nite Convention - OCA
- 4 Newspaper - The Ugly Realities of Chinatown - Wash. Post
- 5 Study - Asian Amer. - A Case of Benighted Neglect-35 Pages
- 6 Asian American & Litigation
- 7 News - Evicted - Phila. Inquirer
- 8 Study - Socio-Economic Anal of Asian Americans Business
Patterns - 99 Pages
- 9 Reprint - Story of the Chinese in America - Sung
- 10 Reprint - Chinese Americans - Lyman - 26 Pages
- 11 Rise of Anti-Oriental Agitation - Hill - (Reprint)
- 12 Asian American - Youth Magazine (Reprint)
- 13 Reprint - Special Chinatown Reports - San Francisco
Magazine
- 14 A Study of Asian Americans - Trends Magazine
- 15 How the Other Half Live - Riis
- 16 Reprint - The Chinese Experience in California
- 17 America's Chinatown Feel Shock Waves - U.S. News-(Reprint)
- 18 Reprint - Untitled
- 19 Civil Rights Digest - Chinese American, etc.
- 20 Education Concerns of A&P Americans - HEW
- 21 Forgotten Minority - Asian Americans in NY
- 22 We the Asian Americans - Bureau of Census
- 23 Chinese Immigrant Children - Chao - CCNY
- 24 Letter - Dyna East Corporation
- 25 Comments - Special Commission on Asian Minority Status
with Appendix A&B. (A) Asian American Legal Defense &
Education Fund - Kaiser V. Weber
Appendix B - Dept. of Commerce - See '8 above
- 26 Letter - OPM to W.A. Clement
- 27 Commission on Asian American Affairs-(Letter)
- 28 United Auto Workers-(Letter)
- 29 Letter - Comments from National Legal Center-Public Inter
- 30 Letter - Summary of Some Major Anti-Asian Legislation
- 31 Letter & Comments - Asian, Inc.
- 32 Reprint - Univ. of California vs Bakke
- 33 Brief - Kaiser Alumni vs Weber
- 34 Study - Socio Economic Status of Asian-American Families
in five Major SMSA's - Moulton
- 35 General Level of Well-Being of Asian American
- 36 Economic Status of Asian Women - Asian, Inc.
- 37 Economic and Employment Status of A-P Women-Asian, Inc.
- 38 A View of Poor Linkages Between Education, Occupation &
Earnings for A-A
- 39 Discrimination Employment of A-A-S-F, etc.
- 40 Social Indicators Equality for Minorities and Women

- 41. Brief - Kaiser vs Weber
- 42. Pacific - American Coalition - Summary of A-A Problems
- 43. Letter - Japanese - AM Citizens League
- 44. Letter - Council of Defense & Space Industry Assoc.
- 45. Letter - Japanese American Citizens League & Commerce
Study
- 46. Book - The Bamboo People - Chuman
- 47. Letter - Robert L. Bock

NAME _____ ADDRESS _____

DATE _____



U.S. GOVERNMENT
SMALL BUSINESS ADMINISTRATION
WASHINGTON, D.C. 20416

MAR 5 1982

Mr. Joseph A. Bosco
Bosco & Curry
1220 Nineteenth Street, N.W.
Washington, D.C. 20036

Dear Mr. Bosco:

This is in further response to your February 15, 1982, Freedom of Information Act request regarding women in business and the 8(a) program.

We have discussed your request with the Director of the Women's Business Enterprise Division. It appears that there is no information existing within their Division which pertains to your request.

We have also discussed your request with the Office of the Associate Administrator for Minority Small Business. This is to notify you that we are referring your letter to that office for response. If the information you seek is in existence, it would be located in that office. You will receive a response directly from that office within ten (10) working days following their receipt of our referral.

Should you have any questions regarding the above, please feel free to contact Jan Snare of my staff, or me, on (202) 653-6460.

Sincerely,

Bennett. Kourda

B-1 Nicholas Kalcounos
Director, Freedom of Information/
Privacy Acts Office

Bosco & Curry

ATTORNEYS AT LAW

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March 16, 1982

Mr. Robert L. Wright, Jr.
Associate Administrator for Minority Small Business
Small Business Administration
1441 L Street, N. W.
Washington, D. C. 20416

Dear Mr. Wright:

Your letter dated March 4 was apparently delayed in the mails.

Our position regarding SBA regulations and the "basic procedural issues" relating thereto is stated in our December 24 petition and our January 14 letter to the Administrator in response to your January 12 letter. Should you wish to discuss these matters prior to SBA's formal response to our petition, we are, of course, prepared to do so.

Regarding our FOIA request for information on women in business, we were notified by a January 25 letter from Mr. Kalcounos that the SBA Women's Business Enterprise Division would provide us with the information we requested. On February 2, Carolyn Schoenberg, Director of that Division, wrote to us requesting more specific information. On February 15, we responded to that request in a letter to Mr. Kalcounos with a copy to you based on your February 10 letter. On March 5, Mr. Kalcounos' office wrote again to inform us that the Women's Business Enterprise Division had no information at all on women in business and that, in fact, your office would respond to our request "if the information...is in existence." A copy of that letter is enclosed for your information, and hopefully, your action.

With reference to our FOIA request for information on SBA's Asian Pacific American determination, we have received some materials sent by Mr. Kalcounos' office on January 25, January 27, and February 2. In addition, we are interested in either examining or obtaining copies of items 36, 37, and 40 on the

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BOSCO & CURRY

Mr. Robert L. Wright, Jr.
March 16, 1952
Page two

Index you kindly enclosed with your March 4 letter. Please
advise us of the costs of obtaining copies of these materials.
Thank you.

Sincerely,

Joseph A. Bosco
Joseph A. Bosco

Enclosure
JAB:JB



U.S. SMALL BUSINESS ADMINISTRATION
WASHINGTON, D.C. 20415

OFFICE OF THE ADMINISTRATOR

MAY 11 1982

Mr. Joseph A. Bosco
Bosco & Curry
Attorneys-at-Law
1220 Nineteenth Street, N.W.
Washington, D.C. 20036

Dear Mr. Bosco:

This is in response to your December 24, 1981 letter, requesting that the Small Business Administration make a determination that women are a "socially disadvantaged" group pursuant to Section 8(a)(5) of the Small Business Act, as amended (15 U.S.C. § 637(a)(5)) and 13 C.F.R. § 124.1-1(C)(3)(iv).

After careful consideration of your request, and a study of Pub. L. 95-507 and its legislative history, your request is denied.

An analysis by our Office of General Counsel of Pub. L. 95-507 and its legislative background concludes that women business owners may not qualify as a presumptively "socially disadvantaged" group, pursuant to 13 C.F.R. § 124.1-1(C)(3)(iv). This is based upon our findings that presumptive group "social disadvantage" is primarily intended for the traditional "minority" groups and should not be extended to the broader class of "women." (e.g., H.R. Rep. No. 95-949, 95th Cong., 2d Sess., 1978; H. Conf. Rep. No. 95-1714, 95th Cong., 2d Sess., 1978; 11 Weekly Comp. of Pres. Doc. 1848-49, Oct. 25, 1978).

As you know, however, a business owned, controlled and managed by women might qualify as "socially disadvantaged" on an individual basis pursuant to 13 C.F.R. § 124.1-1(C)(3)(iii).

Your interest in SBA's 8(a) program is appreciated.

Sincerely,

/s/ James C. Sanders

James C. Sanders
Administrator

Bosco & Curry

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JOSEPH A. BOSCO
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*ADMITTED IN MASS ONLY

July 19, 1982

EDUNSEL
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ROY E. GREEN*
HAROLD C. PETROVITS*

*ADMITTED IN D.C. ONLY

Mr. James C. Sanders
Administrator
U.S. Small Business Administration
Washington, D.C. 20416

Dear Mr. Sanders:

Thank you for your letter of May 11 informing us of your decision regarding our December 24 petition. We have waited till now to respond in the hope that we would be receiving the information requested in our April 23 Freedom of Information Request but that has not been forthcoming.

We appreciate your willingness to address the issue raised in our petition on its merits. Some of the earlier correspondence on this matter under your predecessor had suggested a more narrow procedural approach which would have involved the validity of your regulations and related technical questions. You have had the insight and administrative directness to join the issue squarely.

As for the decision itself, we are naturally disappointed. We respectfully submit that it is not correct, is unsupported by substantial evidence or reasoned elaboration, and we request that it be reconsidered in light of the authorities we cited on December 24.

We consider it somewhat significant that your letter simply ignores the authoritative record in support of our petition and instead chooses to cite earlier reports which were either superseded by or incorporated within subsequent expressions of Congressional intent on this subject. We ask that you instruct your Office of General Counsel to address directly the legal arguments set forth in our petition.

Bosco & CURRY

Mr. James C. Sanders
July 19, 1982
Page Two

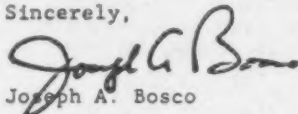
The selective conclusory citation of only part of the record without regard to subsequent Congressional actions and statements is not acceptable administrative procedure.

Moreover, even taking your letter on its own terms, your decision is not supported by the explanation offered as a basis. For example, your letter states that "...Presumptive group 'social disadvantage' is primarily intended for the traditional 'minority' groups..." (my emphasis). Yet, you apply the standard as if it were exclusively so intended. Is that in fact the SBA's reading of the statute and the legislative history? If so, please cite your specific authority for such a position and how it relates to the extensive quotations and citations set forth in our petition.

Finally, you state that women-owned businesses might qualify on an individual basis. In view of the failure of SBA to prepare and submit to the Congress the required reports on women in business--a major lapse in carrying out the agency's responsibilities and possibly highly significant as a reflection of attitudes on this subject--we requested, on April 23, SBA's information on those cases of individual women-owned businesses having been qualified under 13 C.F.R. s. 124.1-1(C)(3)(iii). SBA has not complied with our request under the Freedom of Information Act within the statutory period and we ask that you take immediate action to rectify this failure.

We look forward to timely and favorable responses to our request for reconsideration and for information under F.O.I.A.

Sincerely,



Joseph A. Bosco

JAB/jmc



U.S. GOVERNMENT
SMALL BUSINESS ADMINISTRATION
WASHINGTON, D.C. 20416

AUG 10 1982

Joseph A. Bosco, Esq.
Bosco & Curry
Attorneys at Law
1220 Nineteenth Street, N. W.
Washington, D. C. 20036

Dear Mr. Bosco:

Your letter of July 19, 1982, asking for a reconsideration of the Administrator's decision of May 11, 1982, denying your request that the Small Business Administration make a determination that women are a "socially disadvantaged" group pursuant to Section 8(a)(5) of the Small Business Act is denied.

Your petition of December 24, 1982, was carefully considered, including the authorities cited and they were rejected as unsupportable. We see no useful or legal reason to address directly each legal argument raised in your petition. The Administrator's May 11, 1982, letter cited the legal reasons for denying your petition.

As to your FOIA request of April 23, 1982, requesting information on the cases of individual women-owned businesses having qualified for the Section 8(a) program, Mr. Edward D. Hoffman, Chief, Eligibility Branch, Office of Minority Small Business, will contact you directly.

Sincerely,

Robert Webber
General Counsel



AUG 11 1982

Mr. Joseph A. Bosco
Bosco & Curry
Attorneys At Law
1220 19th Street, N.W.
Washington, D. C. 20036

Dear Mr. Bosco:

This is in response to your letter dated April 23, 1982, to Mr. Robert L. Wright, Jr.

Initially, let me apologize for the tardy answer but your original request was misplaced, hence the delay in our reply.

We do not separate our correspondence or records by racial, ethnic or cultural category. We have, however, compiled from memory, a list of firms owned by women not members of the groups named in the Code of Federal Regulations, 13 C.F.R. 124.1-1(c), which have been admitted to the program since the enactment of P.L. 95-507. We believe that the information is accurate and hope that it is of assistance to you.

Sincerely,

A handwritten signature in cursive script that reads "H. Robert Saldivar".

H. Robert Saldivar
Director
Office of Business Development

cc: One Boston Place
Boston, Massachusetts 02108

SBA

Kathy A. Anderson
Kathy's Krane
245 East 6th Street
St. Paul, Minnesota

612-227-0007

Janet Haney
Hutchinson Construction
2431 Highland Drive
Salt Lake City, Utah 84106

801-485-5200

Louise Woerner
Home Call of Rochester, Inc.
100 White Spruce Blvd.
Rochester, New York 14623

Roma Malkani
Information Systems & Network
15116 Winesap Drive
Gaithersburg, Maryland 20760

301-258-9341

Donna N. Choma
ABA
801 21st Street
Arlington, Virginia 22202

703-525-6020

Maxine Mount
Building Services Unlimited, Inc.
112 West 5th Street
Cincinnati, Ohio 45220

513-721-1409

NATIONAL ASSOCIATION of WOMEN FEDERAL CONTRACTORS

STATEMENT MADE BY THE NATIONAL ASSOCIATION OF WOMEN FEDERAL CONTRACTORS AT THE WHITE HOUSE, 27 OCTOBER 1982:

"Mr. President, every woman in America knows your position on the Equal Rights Amendment, your belief that women's rights can be fully protected by enforcing existing laws, and your promise to modify them where they are shown to be unfair to women.

Mr. President, an extraordinary opportunity now exists to make good on your campaign pledge because such a law exists which is clearly discriminatory to women...the exclusion of women as a group from the Small Business Administration's 8(a) business development program.

With a stroke of your pen, you can make good on your campaign promise, and you can open the American economy to a virtually untapped resource...the creativity and entrepreneurship of women-owned businesses.

If you add women to the SBA's 8(a) program, you would be encouraging their entry into the free enterprise system in a concrete way, creating more jobs for others, and joining the National effort in economic growth. Women would go from dependent on government resources, to contributors to government resources."

Comments Obtained:

Mr. Reagan: The President expressed his complete surprise and lack of preparation for the statement. Cited his belief that there was an on-going Task Force charged with finding those laws which are unfair to women. Mrs. Dole supported the President's remembrance by explaining such a Task Force was indeed in place, and that she would assign Mr. Herrera of the SBA to look into the matter. Mr. Reagan summarized that the matter would be looked into and that Mrs. Dole had personally assigned Mr. Herrera to do same. When the President departed he made a point of speaking to me personally to express his appreciation for the matter having been called to his attention and, that he had not previously realized there was such an issue.

Furthering the interests of all women entrepreneurs who sell, or want to sell, their goods and services to the federal government and to large federal contractors.

Ms. Shirley Vaine, Executive Director, NAWFC, P.O. Box 178128, San Diego, CA 92117 •

Dr. Marilyn Andrulis, President, NAWFC, P.O. Box 5543, Washington, D.C. 20016



U.S. SMALL BUSINESS ADMINISTRATION
WASHINGTON, D.C. 20416

JAN 14 1983

Dr. Marilyn W. Andrulis
President
National Association
of Women Federal Contractors
Post Office Box 5543
Washington, D. C. 20016

Dear Dr. Andrulis:

This is in reply to your letter of December 22, 1982, and to our meeting of January 7, 1983. We appreciate your interest and concern regarding the status of women business owners and their eligibility for the Agency's 8(a) Program.

As you know, the provisions of Public Law 95-507 preclude the Agency from presuming "social disadvantage" as a group eligibility factor for other than those listed in the legislation and those administratively determined pursuant to 13 C.F.R. 124.1-1(c)(3)(11).

You are aware, I know, a petition was filed during December, 1981 on behalf of the National Association of Women Federal Contractors seeking designation of "women business owners" as a "socially disadvantaged group" for the purpose of Section 8(a) program eligibility. After careful examination of the request and a thorough examination of Public Law 95-507 and its legislative history, the Office of General Counsel concluded that presumptive group "social disadvantage" is primarily intended for the traditional minority groups. The Administrator formally denied the petition on May 11, 1982.

Pursuant to the above, the Small Business Administration is limited to that section of the regulations that addresses: "Individuals Not Members of Designated Groups" (13 C.F.R. 124.1-1(c)(3)(iii)). Those individuals: "must establish their social disadvantage on the basis of clear and convincing evidence" in order for SBA to be able to establish the fact that a woman business owner, not a member of a designated group, is socially disadvantaged. We are in the process of proposing changes in the current regulations which will provide clearer guidelines for persons seeking to be individually determined socially disadvantaged.

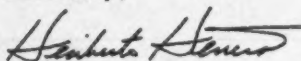
Recognizing the difficulty this may pose for any individual, I have asked the Director of the Office of Women's Business Ownership and the Associate Administrator, MSB/COD to coordinate the Agency's Standard Operating Procedures and regulations in order to assure that those procedures and regulations are reflective of SBA's position to make equitable, within established laws and regulations, all application processes relating to federal procurement.

Additionally, you may want to give some thought to having your Association, in close concert with our Office of Women's Business Ownership, help develop guidelines which assist individuals in their presentation of "clear and convincing evidence" of their 8(a) eligibility as it relates to "social disadvantage."

In regard to your December letter, the definition of "women-owned business" as it already exists in Executive Order 12138 "means a business that is at least 51 percent owned by a woman or women who also control and operate it." This definition is also utilized throughout the Agency. Further, the definition of small business, for SBA purposes, includes all forms of profit making concerns, i.e., corporations, partnerships, and sole proprietorships. We concur that the majority of women-owned businesses are sole proprietorships. Currently, over 12,000 women-owned businesses of all types are registered in our Procurement Automated Source System (PASS).

Please feel free to contact Carolyn D. Gray, Director, OWBO should your organization desire to proceed with the above suggestion.

Sincerely,



Heriberto Herrera
Deputy Administrator

cc: Carolyn Doppelt Gray
Director, Office of Women's Business Ownership

Robert Webber, General Counsel

Robert Wright, Associate Administrator for
Minority Small Business and Capital Ownership Development

NATIONAL ASSOCIATION OF WOMEN FEDERAL CONTRACTORS

14 January 1983

Mr. Edward Rutledge
Regional Director
Mid-Atlantic Regional Office
United States Civil Rights Commission
2128 L Street NW, Room 518
Washington, DC 20037

Dear Mr. Rutledge:

Subject: Request for Priority Response to Promised Information .
Concerning DOT's Practices and Policies for Women as
Minorities Pursuant to the Railroad Revitalization and
Regulatory Reform (4R) Act of 1976 (4R Act).

It is at the suggestion of Mr. Robert Owens of your office that we are writing you directly to ask your assistance in fulfilling the subject request.

By way of background, the National Association of Women Federal Contractors (NAWFC) was invited to submit testimony before the Inter-Regional Committee (IRC) hearing convened at the Small Business Administration (SBA) on 15 September 1982. The IRC hearing was held for the purpose of investigating the equal opportunity contracting practices of the Northeast Corridor Improvement Project (NECIP), a project established by the 4R Act of 1976.

A copy of NAWFC'S prepared statement delivered before the IRC is enclosed herein for your convenient review. You will note that NAWFC posed three questions of the Civil Rights Commission: two dealing with the discriminatory treatment of women federal contractors by the DOT in comparison to DOT's treatment of traditional minorities; and one identifying SBA's discriminatory regulations for determining women eligible for 8(a). The importance of the latter question is that we have been informed that the DOT considers P.L. 95-507 to somehow supercede the 4R Act, as narrowly related to the treatment of women federal contractors. However, contrary to the specific intent of the Congress, to wit,

"sex discrimination...must be considered as resulting in social disadvantage within the meaning of 8(a)." (Language drawn from House Report 95-949; adopted by the Conference Committee Report accompanying P.L. 95-507),

Furthering the interests of all women entrepreneurs who sell, or want to sell, their goods and services to the federal government and to large federal contractors.

NAWFC 1511 K Street, N.W., Suite 839, Washington, D.C. 20005 • (202) 638-3336
Ms. Shirley Vaine, Executive Director, NAWFC, P.O. Box 178128, San Diego, CA 92118 • (714) 292-5842
Dr. Marilyn Andrulis, President, NAWFC, P.O. Box 5543, Washington, D.C. 20016

Mr. Edward Rutledge
Regional Director
United States Civil Rights Commission
14 January 1983
Page 2 of 2

the SBA does not currently recognize sex discrimination in the federal marketplace as a form of cultural bias; and, therefore, has not yet determined women presumptively socially disadvantaged pursuant to P.L. 95-507. Hence, the SBA does not recognize the definition of women as minorities which is set forth in the 4R Act, and which must govern the NECIP contracting and subcontracting practices.)

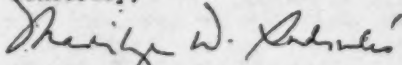
The presiding officer of the IRC hearing, Mr. Angelo Craig, pledged that all three questions raised by the NAWFC of the CRC would be assigned to Mr. Owens for review, and that answers to all three would be provided to NAWFC.

Three months have now passed and Mr. Owens has not had the opportunity to address these questions.

It would be extremely timely were you to authorize Mr. Owens to initiate a priority response to these questions. This is so because NAWFC has raised the issue of SBA's discriminatory treatment of women in its 8(a) eligibility criteria directly to The President at a White House meeting on small business; and, at the meeting Mr. Reagan requested Mrs. Elizabeth Dole, the newly designated Secretary of the Department of Transportation, to assess the matter. Mrs. Dole, on the spot, delegated the responsibility to Mr. Heriberto Herrera, Deputy Administrator of the SBA, who was also present. We understand that Mr. Herrera will be reporting his findings to Mrs. Dole prior to her departure for the DOT.

We appreciate the time and attention you may give this matter.

Sincerely,



Marilyn W. Andrulis, Ph.D.
President

MWA/paf

cc: Mr. Robert Owens, Attorney, Mid-Atlantic Regional Office
Mr. Clarence Pendleton, Chairman, Civil Rights Commission
Mrs. Elizabeth Dole, The White House

NATIONAL ASSOCIATION OF WOMEN FEDERAL CONTRACTOR

Notes on the Discussion Before the Civil Rights Commission

September 15, 1982

I. Brief Introduction of the National Association of Women Federal Contractors (NAWFC).

. Formation: The NAWFC is a non-profit, tax-exempt trade association which was founded in January 1980 at the White House Conference on Small Business to represent those women-owned businesses which sell, or seek to sell, to the federal government or to large federal contractors. NAWFC is unique because its members own, operate and control at least 51% of their businesses, and each seek fair participation in the federal marketplace. NAWFC membership spans the United States, and all realms of business, including construction, manufacturing, R&D and services.

. Activities: NAWFC publishes a newsletter, and holds periodic seminars and conferences. NAWFC has been invited to testify on affirmative action in federal procurement before the United States Senate Small Business Committee, the House Subcommittee on General Oversight and Minority Business Enterprise, the White House, the Office of Federal Procurement Policy, the National Contract Management Association, among others. NAWFC is a member of the Leadership Conference on Civil Rights. In December 1981, through its counsel, BOSCO & CURRY, NAWFC submitted a petition to the Small Business Administration (SBA) for the group inclusion of women in the 8(a) business development program codified by the P.L. 95-507.

II. Synopsis of NAWFC Member's Experiences with the Northeast Corridor Improvement Project (NECIP).

. Inordinate difficulty in simply being registered in the computerized minority business source lists; and, the common

experience that no members have been notified of opportunities for consideration of NECIP contracts, or subcontracts, because of inclusion in any such source list.

. Business Closure. Six women-owned businesses in construction which have been members of NAWFC have gone out of business within the last year.

. WBE Survival Tactic. One women-owned business member of NAWFC has informed us that in order to simply stay in business, it has temporarily agreed to place its employees with a DOT-recognized minority business enterprise. This NAWFC member has further informed us that at no time has any potential NECIP buyer contacted them to pursue affirmative action procurement goals.

III. NAWFC-Requested Questions for the Civil Rights Commission.

(A) of the Department of Transportation:

1. The Railroad Revitalization Regulatory Reform Act of 1976 (the 4R Act) explicitly defines women as minorities.

---the question we ask of the Civil Rights Commission---

On what authority has the Department of Transportation approved the recognition of women business owners as separate and distinct from minority business enterprise, and has permitted separate and arbitrary subcontracting goals for women?

2. Since the 4R Act of 1976 explicitly defines women as minorities, and since Section 211, Section 8(d) of the Small Business Act as amended (P.L. 95-507) identifies presumptive disadvantage for certain named minorities and "other minorities,"

--- the question we ask of the Civil Rights Commission---

On what authority could the claim be made that women are not eligible to benefit from the minority business enterprise program established by the 4R Act? (The Civil Rights Commission should ask the DOT to show the (a) modification to the 4R Act of February 5, 1976, or the (b) relevant legislative history to demonstrate

that it is now the intent of Congress to specifically exclude women from the minority classification pursuant to the implementation of the NECIP.)

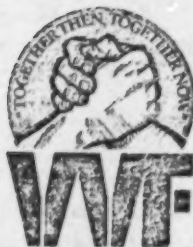
(B) of the Small Business Administration:

3. Statistics and information on barriers indicating the virtual absence of women-owned businesses in the federal marketplace have led every prestigious group which has studied this issue to conclude that women need protected procurement in order to participate in any meaningful fashion. More specifically, every one of these groups has recommended the inclusion of women in the list of eligibles for the SBA 8(a) business development program. The Civil Rights Commission's in-depth study Minorities and Women as Government Contractors concluded that "minority and female entrepreneurs...encounter a great deal of skepticism regarding their ability to perform adequately on government contracts." The Commission urged that the affirmative action door be opened to women---that the SBA find that women "as a group are eligible for participation in the 8(a) program." Currently, 96% of all 8(a) firms are male-owned.

---the question we ask of the Civil Rights Commission---
In light of the NECIP affirmative action goals, wherein women are defined as minorities, does the Civil Rights Commission have the authority to require the Small Business Administration to administratively determine that women as a group are socially disadvantaged pursuant to P.L. 95-507?

Materials submitted for the record:

- (i) NAWFC testimony before the House Subcommittee on General Oversight and Minority Business Enterprise, 18 September 1980.
- (ii) NAWFC petition to the SBA for administrative determination that women are socially disadvantaged; SBA formal denial; BOSCO & CUREY's response.
- (iii) NAWFC Newsletter of November 1981.



VIETNAM VETERANS FOUNDATION

Statement Of

The Vietnam Veterans Foundation

Before The

U.S. Senate Small Business Committee

February 25, 1983

Mr. Chairman and members of the Committee, thank you for extending the opportunity to present the views of our organization. This is our third appearance before this committee having previously appeared on February 18, 1981 and June 4, 1980. We hope our input will be of assistance in establishing your small business agenda for the 98th Congress vis a vis Vietnam veterans needs and programs. I am Tom Wincek, Chairman of the Vietnam Veterans Foundation. With me today are Mr. Robert Sniffen, our Executive Vice Chairman and Mr. J. Thomas Burch, Jr.; who is General Counsel for the VVF.

Senator Weicker, before we present our formal statement for the record, the VVF wishes to sincerely acknowledge its appreciation for your personal and active leadership on behalf of Vietnam veterans. Your decisive actions after our June meeting and again in the waning days of the 97th Congress are the difference between discussing the current SBA veterans program before us today or having no veterans program at all. It was your strong leadership that resulted in twenty five million dollars in appropriations for direct loans for disabled and Vietnam veterans under P.L. 97-72.

Additionally, the involvement of your Committee and its staff members resulted in a three million dollar allocation to implement programs of "Special Consideration" for veterans under P.L. 93-237. As you know, Mr. Chairman, Public Law 93-237 was enacted in 1975 but was granted no appropriations until your involvement and support this past Congress. Thus, the VVF would like to acknowledge your achievements on behalf of this group. While we have played a significant role on this issue, it has been your final actions that have resulted in the fulfillment of Congressional responsibilities in this specific area.

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... Mr. Chairman, the problems before us today are similar to those problems existing in 1979 when the Foundation began pursuing implementation of the current laws on the books affecting veterans; especially as they affect the disabled and Vietnam veterans.

Simply put, the VVF has continually called for the implementation of P.L. 93-237 which outlines an excellent program of "special consideration". This is the eighth Congressional hearing in four years that will examine this subject as alluded to earlier. Congress passed additional laws in the 97th Congress to alleviate SBA's documented deficiencies. The President of the United States has signed off on both the authorization language (P.L. 97-72 - November 3, 1981) and the affecting appropriations (P.L. 97-377 - The Concurrent Resolution - December 21, 1982). And yet, Mr. Chairman, all this has not benefitted the veteran. To this date, not one cent of the monies requested by Congress and approved by this Administration has reached Vietnam veterans or their programs.

In fact, OMB has asked Congress to allow this Administration to reprogram the money due on account to Vietnam veterans for the purpose of purchasing defaults of the guaranteed loan programs of the SBA.

We totally agree with the recent Stars and Stripes Editorial (February 17, 1983) that states "OMB is stomping on the will of the Congress like a squashed bug".

We wish to submit a copy of this editorial for the record. It details a shameful story of agency neglect, and governmental broken promises.

Now, the latest rumor is that SBA will resist in the spending of the three million dollars allocated by Congress to implement P.L. 93-237. At best, it appears some foot dragging is taking place in SBA.

Senator Weicker, the VVF requests you take whatever action is necessary to end the Administration's game playing that at worst is a breach of promise to the Vietnam veteran or at best stalling for time.

Congressman Neil Smith (D) Iowa, has introduced House Resolution 73 which is designed to negate SBA - OMB's deferral request. We hope you will confer with him on this issue to seek an immediate resolution either in concert with the House or as an independent effort.

The time for waiting is over. The Vietnam veteran is tired of waiting. We ask you to ensure that SBA and our government keep its promises this time around.

We will do all we can to assist in ensuring implementation of the Congressional mandates imposed upon SBA by your recent positive actions.

As to SBA's intent and performance in reference to their veteran responsibilities; the VVF reserves judgement. We see an agency saying the right things that seem to end up being much less; we see a lack of leadership at the staff level of the Office of Veterans Affairs. We see an agency that has an opportunity to implement or impede the will of Congress. We have serious and rightful concerns that we will be presenting before this and other oversight committees of the 98th Congress.

The Foundation will support all reasonable efforts of the SBA, but will not hesitate to criticize those in the agency who attempt to thwart our efforts either by policy or design when it comes to the current commitment embodied in the full implementation of the law.

These are crucial days for the Vietnam veteran. These small-business issues need your review. The review would follow the progress of the SBA as measured by their mandate and their stated commitment.

The position of the VVF is that nothing less than the full implementation of the current laws P.L. 97-72 and P.L. 93-237 is acceptable to the veterans of this country.

Accordingly, Mr. Chairman, we wish to introduce for the record and future consideration the 1983 Legislative Goals and Objectives of the Vietnam Veterans Foundation. These legislative and programatic issues raised in this document are put forth to assist disabled and Vietnam Veteran owned businesses in a broad based manner.

We hope our recommendations will stimulate discussions and more importantly, action on the part of the Congress and the responsible agencies in such areas as procurement contracts, and other business opportunities for disabled and Vietnam veterans.

Mr. Chairman, this concludes our written testimony. With your permission, we have supportive documents to submit for the record. The VVF looks forward to working further with your Subcommittees and other Committees of the Congress to address small business issues effecting disabled and Vietnam veterans.

Once again, we appreciate your efforts in reference to the key business issues of importance to disabled and Vietnam veterans and the free enterprise system.

VIETNAM VETERANS IN BUSINESS III
1983 LEGISLATIVE GOALS & OBJECTIVES
OF THE VIETNAM VETERANS FOUNDATION

This concept-recommendation paper is based upon some four years of intensive research; learned experiences and cumulative expertise developed by the Vietnam Veterans Foundation. It addresses the vital issues facing disabled and Vietnam veterans in the areas of small business and economic development programs. The following recommendations if implemented, will serve to assist disabled and Vietnam veteran owned businesses.

The VVF recommendations are as follows:

President Reagan, his Administration; the S.B.A.; and the Office of Management and Budget should be forced to keep their honor bound commitments under (P.L. 97-72); (P.L. 97-377); and (P.L. 93-237) which would provide for twenty five million additional dollars for FY 1983 for direct loans for Vietnam and disabled veterans. Similar efforts need to be taken in reference to the three million dollars for outreach services for this group allocated to S.B.A. is properly spent.

Oversight hearings by the appropriate congressional committees should be scheduled to determine whether the small business administration is serious about its latest set of commitments. Specific focus should be brought to bear on SBA Administrator Jim Sanders' Veterans in Business Policy Statement issued on May 14, 1982 and SBA's recent task force report on special consideration for veterans in business which contains 29 specific recommendations for improvement of services to veterans as provided for under P.L. 93-237. Reports on SBA's progress in these efforts should be mandated by the Congress.

Interest rates for disabled and Vietnam veterans obtaining loans under Title III of P.L. 97-72 should be given at favorable rates. Additionally, serious consideration should be given to setting lower interest rates for disabled and Vietnam veterans obtaining SBA guaranteed loans. These lower interest rates will assist disabled and Vietnam veterans in obtaining loans and improve their small business opportunities.

Encourage and perpetuate an inter-agency effort amongst the Federal agencies to develop more specific policies, procedures, and regulations designed to assist disabled and Vietnam veterans. Procurement programs should be developed within the Department of Defense, GSA, VA and other government agencies. These programs should include methods by which businesses owned by disabled and Vietnam veterans would be assisted in obtaining subcontracting opportunities as provided for under P.L. 95-507. Small business utilization offices (OSBU) throughout the Federal Government, as well as the procurement center representatives of the

SBA need to be given a stronger role and direction to include disabled and Vietnam veteran owned business in their current procurement activities.

- Major Government contractors should seek out qualified disabled and Vietnam veteran owned businesses and award sub-contracts. Defense contractors should especially develop "partnerships" with disabled and Vietnam veteran owned business in competing for Defense contracts.

- The procurement automated source system (pass) of the SBA needs to be developed as a valid mechanism to assist registered small businesses. Federal agencies purchasing products and services should utilize disabled and Vietnam veteran owned businesses registered with pass. SBA should expand its efforts to contact Vietnam and disabled veteran owned businesses and have them register their company with pass.

- Minority disabled and Vietnam veteran owned businesses should be identified so that they can participate in the SBA's 8(a) procurement program.

- Special efforts should be made to include Vietnam and disabled veteran owned businesses in loans provided by the SBA's Mesbic's and Sbic programs. Special Mesbic's designed to provide capital to disabled and Vietnam veterans, should be conceived, developed and licensed by the SBA.

- Banks should be encouraged to start special programs aimed at assisting disabled and Vietnam owned businesses.

- Develop Vietnam veteran business development centers aimed at providing disabled and Vietnam veteran owned businesses with information and direct assistance on a multi-service level. Financing, loan packaging, product marketing, private and government procurement and contracting opportunities, plus other business opportunities need to be developed in order to properly serve these businesses. Similar efforts have currently been launched by the U.S. Commerce Department's Minority Business Development Agency. Thirty-five million dollars (\$35,000,000.00) for one hundred consulting centers under private contracts in some thirty-seven states, have been staffed with experts in accounting, inventory control, bid estimating, contract negotiations, and other needed areas of technical management and contracting assistance. The VVF cites this program as the very same type of program that is needed if disabled and Vietnam veteran owned businesses are ever going to be properly serviced, given the budget restraints and lack of SBA resources. This

priority objective of the VVF should be considered, authorized, developed and budgeted by this very congress.

- The recently established Office of Veteran Business Enterprise, currently under the Office of Advocacy of the SBA, should be empowered with the necessary staff resources, line authority and leadership personnel to ensure effective actions on the part of veterans, especially disabled and Vietnam veterans. The VVF recommends that Congress closely review this newly created office in an effort to ensure that the authority and direction granted truly exists within the SBA structure. If the OVBE is not presently empowered to carry out the mandates of Congress, then elevation of this OVBE is recommended. Consideration should be given to the creation of an Associate Administrator of Veteran Affairs, to coordinate veterans programs throughout the agency. Codification of this newly created office should be enacted to insure the perpetuation of this office by law, rather than policy statement as is the present justification for SBA's veterans efforts.

- Innovative methods and appropriate programs designed to strengthen and ensure business opportunities for disabled and Vietnam veteran owned businesses at the state levels need to be implemented. Vietnam Veterans Business Councils such as the one currently under consideration by the Maryland state legislature is highly recommended by the VVF as ideal vehicles for SBA's specific focus.

- Congress should take a lead role in instructing SBA and other Federal agencies to develop export opportunities for small and medium sized veteran owned businesses. Current or new programs need to screen in these businesses in such other agencies as the International Trade Administration of the Department of Commerce; the Agency for International Development of the Department of State and the small business program of the Export-Import Bank. The time is ideal to design and implement programs for these veterans businesses under the Export Trading Act of 1982 (P.L. 97-290).

A STATEMENT OF
JAMES G. BOURIE
DIRECTOR FOR ECONOMICS
THE AMERICAN LEGION

ON

~~SMALL BUSINESS~~

FEBRUARY 25, 1983

Mr. Chairman and members of this Committee:

The American Legion wishes to thank the Chairman of this Committee for allowing us the opportunity to presents its views to the Committee in formulating a legislative agenda. We wish to confine our remarks to the veterans program, as that program impacts on nearly all agency programs.

More than any other veterans organization, The American Legion has long been involved with the SBA. As early as 1964, we recognized the need to provide small business assistance to veterans, especially returning Vietnam veterans. The National Economic Commission formed a special Small Business subcommittee to enter into a dialogue with agency officials with the objective being to provide veterans with special access to programs. These discussions resulted in the Administrator, Mr. Sandoval, issuing a policy statement which provided for a liberal interpretation of all SBA policies and programs for veterans. However, in practice, the SBA failed to follow that directive. Thus, The American Legion felt that stronger measures by Congress were needed.

After an intensive lobbying campaign, The American Legion was instrumental in securing "special consideration" for veterans in agency programs in the Small Business Act of 1974 (PL 93-237). And, even though there was a Congressional mandate to provide veterans with "special consideration," precious little was done by the SBA in subsequent years. Veterans were not a high agency priority, and were treated like everyone else, much to the frustration of The American Legion.

However, in 1980, the Legion began once again to work with agency officials in laying the groundwork for a renewed veteran effort. With the direct involvement of the Legion, the SBA began to plan a series of 100 nationwide veteran workshops. Of these veterans workshops, The American Legion sponsored over 20 percent, more than any other veteran organizations, and devoted uncounted volunteer hours to assist the SBA in conducting these affairs. It was indeed a surprise to us that the SBA would devote time, staff and resources to this project, but what was an even greater revelation was the veteran turnout wishing to know more of SBA programs. This desire on the part of veterans, especially Vietnam era veterans, gave us the impetus to pursue an even greater posture with the SBA.

Soon after the 1980 elections, we met with top agency officials to thoroughly discuss a more sophisticated veterans program; something that would have substance, validity, and

visibility. Through a series of top level meetings, the Legion and SBA began to formulate objectives for a comprehensive veterans program. The foundation for this program was the well written, but largely ignored "Pechin Report" on veterans.

One other event had a positive impact on a veterans program when the House Veterans Affairs Committee held oversight hearings in March of 1980. It was quite evident from agency statements that little was being done for veterans. The American Legion also testified, and not only pledged its cooperation to any future SBA involvement, but also recommended a 90-day Task Force to thoroughly review "special consideration" for veterans. The SBA readily agreed to this Task Force, which was chaired by Mr. Frank Swain, Chief Counsel for Advocacy. Representatives of at least seven veterans organizations were invited to participate, as well as top officials from all major SBA programs. In fact, a staff member of this Committee is a member of the Task Force. Working groups were then formed in major agency programs. Each working group was to make recommendations which would then be consolidated into final recommendations to the Administrator. The Legion participated in all working groups, spending up to three days per week, over a period of months, in meetings with agency officials. Rarely did these meetings turn acrimonious; they were, in our estimation, conducted in a spirit of cooperation and mutual assistance. One of the basic

objectives of the Task Force was how best to integrate a veterans program into already existing agency programs, and to also review what the agency could not do for veterans.

The Task Force conducted its affairs far beyond the 90-day time limit, and we wish to compliment Mr. Swain and all the agency officials who so diligently and unselfishly devoted their time and energies to the work of the Task Force. A final Task Force report was presented to the Administrator in early 1982. This report made over 25 substantive recommendations covering nearly all agency programs, as well as establishing new policies and regulations toward veterans.

Without prolonged delay, Mr. James Sanders signed a Policy Statement implementing the recommendations of the Task Force. To the Legion this was a significant event, as this was the first time the SBA officially acknowledged its mandate under "special consideration." It also made an irrevocable agency commitment to ensure that those recommendations were implemented.

Without reservation, The American Legion is of the strong belief that the SBA is pursuing a forthright path to bring about a viable and responsive veterans program, and the Legion will continue to work with the SBA as a partner. At no time during our relationship did we feel that the SBA was less than sincere in its attempt at a veterans program. Our relationship is one founded in an honest effort to assist veterans. In our long years of involvement in veterans programs, we have

not seen too many other federal agencies commit themselves more readily and expeditiously to a veterans program as did the SBA.

We believe the SBA's veterans program is now on firm footing and, like all new programs, is in a period of transition and trial and error. There is established a permanent and visible Veterans' Office, staffed by dedicated and knowledgeable individuals under the capable direction of Marshall Parker, Assistant Administrator for External Affairs; comprehensive veterans demonstration projects have been conducted, with more planned; Veterans Affairs Officers have been assigned in all field offices; and training guides, as well as seminars, are planned. But, more importantly, the veterans program has the full backing of the Administrator.

These are just a few of the positive efforts being made, due in part to the \$3 million provided to the SBA for veterans outreach efforts. The American Legion wishes to thank the Chairman of this Committee, Senator Weicker, and all Committee members for their efforts to provide this needed funding. We also share this Committee's concern over the fate of the \$25 million small business program for Vietnam era veterans and disabled veterans authorized by PL 97-72. The American Legion is vigorously opposed to OMB's decision to defer this Congressional authorization. Modest as it may be, Congress enacted the program for Vietnam era veterans, a group which is now at the age when one contemplates owning a business. Moreover,

such action confuses and embitters veterans when Congress funds a veterans program only to have it snatched away.

We are also concerned over the future of the veterans program within the SBA. It is currently on the high road, enjoying good visibility and commitment, and we don't anticipate any difficulties. But we are indeed sensitive to the fact that all veterans efforts are created by administrative fiat. Thus, it can be easily terminated, destroying all that has been built. Again, we do not think this likely. Nonetheless, The American Legion may at some future point petition this Committee and Congress to amend the Small Business Act to provide a veterans program by Congressional mandate. However, we have no plans for this at the present time. We would also like to see this Committee hold periodic oversight hearings on the veterans programs, with such inquiry in part directed at the amount of direct funding being committed towards outreach efforts.

To conclude, The American Legion stands as a partner with the SBA with its veterans program. And we will continue to do so, as the SBA has shown to us its honest intention to bring about a viable and responsive veterans program.

STATEMENT OF

DEWEY THOMAS, JR., EXECUTIVE DIRECTOR
NATIONAL ASSOCIATION OF MINORITY CONTRACTORS

BEFORE THE
SENATE SMALL BUSINESS COMMITTEE
UNITED STATES SENATE

FEBRUARY 25, 1983

LEGISLATIVE AND REGULATORY ISSUES AND PRIORITIES
98TH CONGRESS

MR. CHAIRMAN AND MEMBERS OF THIS COMMITTEE:

IT IS A PLEASURE TO APPEAR BEFORE YOU TO DISCUSS OUR LEGISLATIVE PRIORITIES AND PROVIDE RECOMMENDATIONS THAT WE BELIEVE SHOULD BE ADDRESSED BY THIS COMMITTEE DURING THE 98TH CONGRESS.

THE NATIONAL ASSOCIATION OF MINORITY CONTRACTORS (NAMC) IS A NON-PROFIT, FULL SERVICE MEMBERSHIP ASSOCIATION WITH THE PRIMARY OBJECTIVE OF ASSISTING MINORITY CONTRACTORS IN BECOMING VIABLE, TAX-PAYING BUSINESSES IN OUR FREE ENTERPRISE SYSTEM. MORE SPECIFICALLY:

- TO ACT AS A NATIONAL SPOKESMAN FOR MINORITY CONTRACTORS RELATING TO CURRENT AND PENDING GOVERNMENT REGULATIONS;
- TO FACILITATE THE TRAINING OPPORTUNITIES FOR MINORITY CONTRACTORS IN THE SKILLED CRAFTS OF THE BUILDING INDUSTRY;
- TO ASSIST IN IDENTIFYING AND DEVELOPING TECHNICAL, EDUCATIONAL, MANAGEMENT AND FINANCIAL RESOURCES TO AID MINORITY CONTRACTORS;
- TO ASSIST IN IDENTIFYING RESOURCES THAT WILL INCREASE THE CAPACITY OF MINORITY CONTRACTORS TO PROCURE AND MANAGE LARGER CONSTRUCTION PROJECTS;

- TO IDENTIFY APPROPRIATE AND VIABLE ASSISTANCE FOR MINORITY BUILDERS IN OBTAINING BONDING, AS WELL AS ACTIVELY INITIATING AND DEVELOPING ALTERNATIVE METHODS TO MEET BONDING/PERFORMANCE PAYMENT REQUIREMENTS; AND
- TO PROVIDE THE STRONG LEADERSHIP NECESSARY TO BRING ABOUT INDUSTRY PARITY FOR MINORITY CONTRACTORS.

MR. CHARIMAN,

SPECIFIC ISSUES AND CONCERNS THAT WE WOULD LIKE TO SEE THIS COMMITTEE ADDRESS DURING THE 98TH CONGRESS ARE AS FOLLOWS:

LEGISLATIVE

RETAINAGE

CONGRESSMAN MITCHELL INTRODUCED H.R. 5022 IN THE 97TH CONGRESS. THIS BILL WOULD HAVE ELIMINATED THE FEDERAL GOVERNMENT'S RETAINAGE POLICY (THE PRACTICE OF HOLDING BACK A PERCENTAGE, USUALLY 10 PERCENT, OF PROGRESS PAYMENTS MADE TO CONTRACTORS DURING THE COURSE OF PERFORMING THEIR WORK ON FEDERAL GOVERNMENT PROJECTS). OUR ASSOCIATION SUPPORTS THE REINTRODUCTION OF THIS BILL DURING THE 98TH CONGRESS, AND ASK THAT THIS COMMITTEE SUPPORT THE BILL WHEN IT IS REINTRODUCED. WE BELIEVE THE FEDERAL GOVERNMENT HAS AT ITS DISPOSAL SUFFICIENT MEANS AND METHODS TO ASSURE TIMELY AND PROPER PERFORMANCE BY THE CONTRACTOR, SUCH AS PERFORMANCE BONDING, ETC.

● COMMERCE BUSINESS DAILY

NAMC SUPPORTS THE REINTRODUCTION OF H.R. 5551, INTRODUCED BY CONGRESSMAN MITCHELL DURING THE 97TH CONGRESS (THIS WOULD REQUIRE A FORTY DAY TIME FRAME FOR SOLICITATION AND BID). WE HEAR OF TOO MANY INSTANCES WHERE COMPETITIVE BID OPPORTUNITIES FOR SMALL BUSINESSES ARE LOSS BECAUSE OF TOO LITTLE TIME TO PREPARE AND SUBMIT THEIR BIDS. THIS COMMITTEE IS ASKED TO SUPPORT THIS BILL WHEN IT IS REINTRODUCED DURING THE 98TH CONGRESS.

● BONDING

NAMC RECOMMENDS THAT A BILL BE INTRODUCED TO INCREASE THE DOLLAR THRESHOLD OF THE MILLER ACT BONDING REQUIREMENTS ON FEDERAL PROJECTS FROM \$25,000 TO \$100,000. THIS WOULD ENABLE STRONGER COMPETITION AND INCREASE SAVINGS TO FEDERAL AGENCIES, AND ENABLE SMALL BUSINESSES TO ENHANCE THEIR BUSINESS DEVELOPMENT.

REGULATORY

● MINORITY BUSINESS ENTERPRISE AND OMB CIRCULAR A-76
OUR ASSOCIATION BELIEVES THAT THE RECENTLY PUBLISHED REVISED RULES ON CIRCULAR A-76 (CONSOLIDATION CONTRACTING OUT), WHICH APPEARED IN THE FEDERAL REGISTER ON JANUARY 12, 1983 FOR PUBLIC COMMENT WILL, AS WRITTEN, ADVERSELY IMPACT SMALL AND MINORITY OWNED BUSINESSES. IF THE PROPOSED RULES ARE ADOPTED

WE BELIEVE THAT SMALL AND MINORITY BUSINESSES WILL BE PRECLUDED FROM COMPETING AS PRIME CONTRACTORS- PRIMARILY BECAUSE OF THE DIVERSITY OF SERVICES AND LARGE DOLLAR VOLUME CAUSED BY THE CONSOLIDATION. AS ADVOCATES OF ALL SMALL BUSINESSES, WE ASK THAT THIS COMMITTEE THRU ITS OVERSIGHT RESPONSIBILITIES DO WHATEVER IS NECESSARY TO ASSURE THAT SMALL AND MINORITY OWNED BUSINESSES DO NOT LOSE THIS IMPORTANT AND SIGNIFICANT PART OF THEIR COMPETITIVELY BID GOVERNMENT BUSINESS.

OVERSIGHT RESPONSIBILITIES - U.S. SMALL BUSINESS ADMINISTRATION

- SBA SIZE STANDARDS - SBA WILL BE PUBLISHING IN THE NEAR FUTURE PROPOSED REGULATIONS ON SIZE STANDARDS. OUR MEMBERSHIP AND CONSTITUENCY WILL BE ON THE ALERT FOR THESE NEW PROPOSED REGULATIONS. WE ASK THAT THIS COMMITTEE CONDUCT AN IN-DEPTH REVIEW OF THE PROPOSED REGULATIONS AND TAKE WHATEVER ACTION DEEMED APPROPRIATE TO ASSURE THE SMALL BUSINESS COMMUNITY THAT THE REGULATIONS PROPOSED ARE FAIR AND EQUITABLE. AS WRITTEN, MANY SMALL BUSINESSES WILL OVERNIGHT BECOME LARGE BUSINESSES, AND FIND THEY ARE NO LONGER ELIGIBLE FOR SMALL BUSINESS PROCUREMENT OPPORTUNITIES FROM THE FEDERAL SECTOR, OR OTHER SMALL BUSINESS ASSISTANCE SUCH AS SBA GUARANTEED LOANS, ETC. THIS WILL BE DEVASTATING AND FATAL TO SMALL BUSINESSES DURING THE CURRENT ECONOMIC CRISIS WHICH PREVAILS THROUGHOUT THE COUNTRY. OUR ASSOCIATION BELIEVES THAT THE CURRENT SIZE STANDARDS SHOULD REMAIN AS WRITTEN UNTIL AT LEAST

THE ECONOMIC CONDITIONS OF THE COUNTRY IMPROVE.

SIZE STANDARDS AND SECTION 8(a) FIRMS

SECTION 8(a) FIRMS ARE BEING MEASURED FOR THEIR SIZE AGAINST THE EXISTING SBA SIZE STANDARDS. ALL SECTION 8(a) RECEIPTS ARE COUNTED ALONG WITH NON-8(a) RECEIPTS IN DETERMINING WHETHER AN 8(a) FIRM IS LARGE OR SMALL. NAMC STRONGLY BELIEVES THAT THE SBA SHOULD CHANGE ITS REGULATIONS TO EXCLUDE 8(a) RECEIPTS, OR A PORTION THEREOF, FROM BEING COUNTED IN THIS SIZE DETERMINATION. CURRENTLY, AN 8(a) FIRM CAN BE DETERMINED TO BE BIG BUSINESS BASED ON 8(a) CONTRACT RECEIPTS ONLY, FURTHER 8(a) CONTRACTING STOPPED; AND THE FIRM REMOVED FROM THE 8(a) PROGRAM IMMEDIATELY. SUCH A FIRM WOULD IMMEDIATELY HAVE TO COMPETE WITH BIG BUSINESSES IN ORDER TO EXIST AS A VIABLE BUSINESS. IN THIS INSTANCE, THE 8(a) PROGRAM WHICH PROVIDED CONTRACTS TO ASSIST A MINORITY OWNED BUSINESS, IS HAMPERED IN ITS EFFORTS TO DEVELOP THE FIRM AS A VIABLE BUSINESS ENTITY AS MANDATED BY P.L. 95-507, BECAUSE OF THE FULL APPLICATION OF THE SBA SIZE STANDARDS ON THE 8(a) FIRM. WE ASK THAT THIS COMMITTEE INTERCEDE IN BEHALF OF MINORITY OWNED BUSINESSES PARTICIPATING IN THE 8(a) PROGRAM, AND REVIEW THE POSSIBILITY OF OUR RECOMMENDATION BEING IMPLEMENTED AT THE SMALL BUSINESS ADMINISTRATION.

OMB CIRCULAR 570 (SURETY COMPANIES ACCEPTABLE ON
FEDERAL BONDS)

EACH YEAR THE DEPARTMENT OF THE TREASURY PUBLISHES DEPARTMENT CIRCULAR 570 (COMPANIES HOLDING CERTIFICATES OF AUTHORITY AS ACCEPTABLE SURETIES ON FEDERAL BONDS AND AS ACCEPTABLE REINSURING COMPANIES). THE DEPARTMENT OF THE TREASURY CERTIFIES THAT THE LISTED COMPANIES HAVE COMPLIED WITH THE LAW AND THE REGULATIONS OF THE TREASURY DEPARTMENT AND ARE ACCEPTABLE AS SURETIES AND REINSURERS ON FEDERAL BONDS, TO THE EXTENT AND WITH RESPECT TO THE LOCALITIES INDICATED. WE BELIEVE THE CRITERIA FOR LISTING COMPANIES WEIGHS HEAVILY ON THE FINANCIAL STRENGTH OF SUCH COMPANIES. NAMC RECOMMENDS THAT THIS COMMITTEE INVESTIGATE THE CRITERIA FOR ELIGIBILITY CURRENTLY BEING EMPLOYED BY THE DEPARTMENT OF TREASURY, AND HAVE INCORPORATED INTO THE ELIGIBILITY CRITERIA GOALS FOR PROVIDING BONDING TO SMALL AND MINORITY OWNED BUSINESSES. GOALS WOULD HAVE THE POSITIVE EFFECT OF ENHANCING THE BONDABILITY OF SMALL AND MINORITY OWNED BUSINESSES WHO WOULD OTHERWISE BE FOUND TO BE INELIGIBLE FOR BONDING. IN MANY INSTANCES, SMALL AND MINORITY OWNED BUSINESSES ARE REFUSED BONDING BY SURETIES REGARDLESS OF TRACK RECORD OR FINANCIAL STRENGTH.

MR. CHAIRMAN, THIS CONCLUDES OUR LEGISLATIVE AND REGULATORY RECOMMENDATIONS TO THIS COMMITTEE AT THIS TIME. WE LOOK FORWARD TO CONTINUING OUR WORKING RELATIONSHIP WITH THIS COMMITTEE AND WILL

KEEP OUR MEMBERSHIP AND CONSTITUENCY APPRISED
OF YOUR PROGRESS.

IF YOU OR THE MEMBERS OF THIS COMMITTEE HAVE
ANY QUESTIONS, I WOULD BE HAPPY TO ANSWER THEM.

STATEMENT OF
WILLIAM J. BIRKHOFFER
DIRECTOR OF GOVERNMENTAL AFFAIRS
AMERICAN CONSULTING ENGINEERS COUNCIL
REGARDING
SMALL BUSINESS ISSUES
AFFECTING THE ARCHITECT-ENGINEER PROFESSION
BEFORE THE
COMMITTEE ON SMALL BUSINESS
UNITED STATES SENATE



February 25, 1983
Washington, D.C.

Statement Of William J. Birkhofer

Mr. Chairman and Members of the Committee, my name is William J. Birkhofer and I am Director of Governmental Affairs at the American Consulting Engineers Council.

As a nationwide federation of over 3,800 independent engineering firms, ACEC represents more than 110,000 professional, technical and support persons. These firms range from sole proprietorships to multi-branch corporations. However, a very large majority are small businesses. Fields of practice include civil, electrical, mechanical, structural and geotechnical engineering, with projects ranging from acoustics to water pollution abatement.

As a representative of so many small firms, ACEC appreciates this Committee's continuing initiatives in establishing a healthy small business environment. Since 36 percent of the services consulting engineers perform over-all are for the federal government, directly or indirectly, ACEC particularly commends your efforts to pass the Prompt Payments Act of 1982 last year.

ACEC also commends this Committee's efforts in passage of S. 262, extending the minimum time period for publication of and bidding on all federal contracts, thereby enhancing opportunities for small businesses to participate in the federal procurement process. Providing firms with additional response time should lead to significant improvements in the quality of responses and thereby lead to improved quality in the services procured.

Contracting-Out

ACEC urges the Committee to actively explore the favorable impact of "contracting-out" on small businesses of all types, though we recognize that the Committee on Governmental Affairs has primary jurisdiction over this matter.

As this Committee has noted, the federal government has adopted a policy favoring reliance on the private sector, as opposed to in-house government activities, for needed goods and services. Regretably, however, this policy, embodied in OMB Circular A-76, has not been consistently or fully implemented.

Small engineering firms have long been concerned with the "contracting-out" problem, particularly in the context of competition from in-house design staffs of the U.S. Army Corps of Engineers, the Bureau of Reclamation and other federal agencies. For example, in the Corps' civil works activities, approximately 75 percent of all planning and design work is completed in-house. The Bureau of Reclamation has consistently utilized in-house engineering to complete planning and design for dam projects, notwithstanding the fact that U.S. consulting engineers have been involved in sophisticated dam designs throughout the world.

In the current environment, examples of avoidance of "contracting-out" continue to abound. During the latter part of 1981, the Council was involved in a protracted effort to stave off an Environmental Protection Agency proposal to involve the Corps of Engineers in planning and design activities

associated with its \$1.6 billion Superfund hazardous waste clean-up program. On an even more current note, we have learned that the Bureau of Reclamation is apparently investigating the possibility of developing non-federal financing to fund planning and development of hydropower development in Idaho, Utah, Montana, Wyoming and California by Bureau of Reclamation staff.

Finally, OMB Circular A-76 is inadequate in many respects:

- It is difficult, if not impossible, to develop cost comparison standards that will fully and fairly equate the operations of a government agency with those of a small business. Many comparison items are understated by the government. Others are not included and some (such as profit) simply have no equivalent and thus are not stated.

- Even if an adequate cost comparison methodology could be developed, the process by which the comparison is performed is highly suspect. The government is not only charged with developing the methodology but also applying it, without any involvement or participation by private-sector interests.

- Current A-76 cost comparison guidelines automatically "handicap" the private sector by allowing that "new starts" can be undertaken by government unless a ten-percent cost differential is demonstrated (again through government-conducted cost comparison).

- There are a number of exceptions to the A-76 requirements which government agencies can and do use to "protect" certain activities from contracting-out. One of these is "national defense", which understandably can and should be used to exempt direct combat and security-related activities, but should not be used to protect a

planning and design role for the U.S. Army Corps of Engineers in civil works activities.

Two approaches to making "contracting out" the "law of the land" were introduced last year. One, authored by Senator Hayakawa, would affirm in law the basic policy of the federal government to rely on private enterprise to provide needed goods and services. The other, introduced by Senator Bentsen, would require a study of activities now performed by the federal government to determine which could be performed more efficiently by small business and to transfer those activities to the private sector.

While we again recognize that jurisdiction over this issue must be shared, we believe that the first casualty of greater in-house performance is small business and we urge the Committee to take some action on this important issue.

Size Standards

In establishing the Small Business Administration (SBA) in 1953, Congress directed SBA to "aid, counsel, assist and protect" small business through a range of programs and activities. Eligibility for participation in SBA programs, including set-asides giving small firms preference in the procurement process, was to be governed by "size" of a business within the context of each industry activity.

SBA's stated approach to size standards, then, was to shelter the smallest of firms in a given industry from medium

and large firms so that small firms ". . . have the opportunity to become successful and viable operations in the marketplace." SBA's stated intention is ". . . that the standard for each industry should be established as low as reasonably possible to best serve small businesses"

With this background, the A-E size standard proposed in 1980 (50 employees) and that proposed in May, 1982, (150 employees) fail miserably on all counts.

In its 1981 membership profile, the median firm size in ACEC was determined to be slightly over seven employees. The average firm size was found to be 33.5 employees (representing from 47.5 percent to 83.1 percent of ACEC's membership). The 1977 census of the professional services industry completed by the Commerce Department corroborates the small number of employees in the typical A-E firm -- the average firm among some 30,000 included in the census was approximately 12 employees.

The current size standard for the architect-engineer profession (SIC 8911) is established at \$7.5 million or less in volume annually over three preceding years. Assuming annual revenue per employee of \$43,000 (derived from 1982 statistics on revenue or employment among consulting engineering firms with billings of up to \$7.5 million), a size standard of \$7.5 million in average annual receipts equates to a firm size of 174 employees.

It is ACEC's understanding that SBA's new proposed rules governing A-E size standards are reported to develop separate

standards for: construction-related A-E services; A-E services pertaining to military, aerospace and related programs; and marine engineering services. SBA sources have indicated that the construction-related A-E services category (in which the overwhelming majority of ACEC member firms fall) size standards will be reduced to a \$3.5-million revenue level. Even this proposed adjustment does not adequately reflect a realistic size standard for the A-E profession.

Revision Of Standard Industrial Classifications

The foundation for size standards development and the basis for small business utilization statistics is the Standard Industrial Classification (SIC) system. While ACEC supports the SIC as an important vehicle with which to collect, compile and analyze data relating to businesses, we question the methodology employed by SBA in using the current SIC to establish small business size standards.

The Office of Statistical Policy and Standards, which is responsible for the compilation and revision of the SIC codes, determined last year that the industry definitions upon which the SBA is currently basing its size standards are, to a substantial extent, obsolete. ACEC believes that these inaccurate industry definitions are a contributing factor in SBA's inability to assign size standards that realistically reflect specific industries, including the A-E profession.

We see it as being within SBA's mission to work actively within the Interagency SIC Committee to promote greater accuracy

in using the SIC system in order to tailor size standards to "real world" industry conditions. We request that this Committee closely review the underlying methodology employed by SBA in developing its industry size standards.

We believe that the SIC codes, which were designed to classify "industry" in the broad sense of all economic activity, must be modified to narrowly and specifically define industries within the industry categories. ACEC questions SBA's assertion that broad and general SIC industry categories help determine where size limits are set. More seriously, ACEC also maintains the proposed size standard changes specifically reflect the structure of each individual industry, as well as SBA's ability to concentrate its assistance heavily on smaller firms.

Improvement Of Federal Procurement Data

The same could be said for the operation of the Federal Procurement Data System, whose small business utilization statistics for the A-E profession are highly misleading and inaccurate, primarily due to the breadth of services classified as "architect-engineer" and the range of contractors considered to be "architect-engineers". For example, FPDS statistics, which are cited by SBA and other procuring agencies, supposedly reflect a relatively small percentage of small business utilization. Yet the FPDS data includes "A-E services" performed by non-A-E contractors such as Rockwell International, Raytheon, Sperry and Texas Instruments, and include such services as design associated with

nuclear-powered aircraft carriers and submarines. Needless to say, such companies are not typically considered to be independent, professional design practitioners, nor are such services normally completed by independent architects or consulting engineers.

Significantly, these statistics also show significant "architect-engineer" work performed under "status of forces agreements" by foreign governments, state and local government agencies and not-for-profit institutions.

Finally, the FPDS statistics typically measure small business utilization not on the basis of the "number of projects" but on "dollar volume", which skews the statistics even further. To our knowledge, the FPDS system does not record volume of work performed by small businesses under subcontract nor does it specifically delineate contract awards to minority- and women-owned businesses.

Again, we believe these "building blocks" of the small business procurement system need attention and we are particularly concerned that OMB has recommended postponing review and revision of the SIC system until 1987.

Small Business Set-Asides

ACEC believes that a federal commitment must be made to maintain a fair and reasonable level of set-asides for small and disadvantaged businesses in all classes and types of procurements, with the balance of procurements subject to free and

open competition. Because of the unique character of A-E practice insofar as the ability of even a small firm to design a fairly major facility, a designation of "small" and "large" A-E businesses may not apply in the same way that it applies to other industry businesses.

Fair and reasonable levels of set-asides are often difficult for federal agencies to maintain, particularly for industries, including the architect-engineer profession, which are considered "procurement sensitive". These industries bear a disproportionate share of systemwide small business utilization objectives in agencies -- such as the Department of Defense -- thereby allowing contracting authorities to avoid significant small business utilization in other areas where large procurements are most convenient or desirable to agency procurement personnel.

Since 1980, small business procurement trends are up; nearly 60 percent of A-E contract opportunities in the Department of Defense were set aside, with over 20 percent of additional A-E contracts awarded to small business. ACEC believes that it has reason to question an agency's policy which appears to freeze out 200 to 300 of its largest members while at the same time does not provide market opportunities for its smallest firms.

In its recent report to the Senate Armed Services Committee regarding its small business set-aside program as it applies to A-E services, the Department of Defense suggests that a more comprehensive evaluation of the state of the entire A-E industry be

undertaken by the SBA, DOD and Congressional committees which have a vested interest in the small business set-aside-program. ACEC welcomes such an evaluation and requests that this Committee hold an investigative hearing regarding agencies' disproportionate utilization of "procurement sensitive" industries such as the A-E profession in carrying out their small business set-aside programs.

The DOD report which was requested in accordance with the Senate Committee on Armed Services Report 97-440 has been included with this statement for review by members of the Senate Committee on Small Business.

ACEC is concerned by DOD's continued failure to understand the A-E profession's concern that its current policy regarding set-asides for A-E small businesses serves to provide disproportionate contract awards to mid-size A-E firms at the expense of the smaller firms making up the A-E profession, as well as the firms whose size disqualifies them from participating in the set-aside program. Statistics provided by DOD compare only large and small A-E procurement statistics. Also, DOL makes no effort to differentiate between the various types of A-E services procured (i.e., construction- vs. weapon-related services). ACEC suggests that this Committee review in further detail the breakdown of types of A-E services procured by DOD in terms of size of firm.

Minority- And Women-Owned Business Programs

Another area of concern to ACEC is SBA's effectiveness in assisting small and disadvantaged firms' development through federal procurement opportunities. ACEC believes that the SBA 8(a) program is generally designed for the procurement of tangible goods and services for which there is a defined scope of work in advance; i.e., construction contracts. We feel that, historically, minority and women architects and engineers have not significantly benefitted from the program.

The federal government is uniquely situated to produce accurate data indicating potential concentrations of specific types of services provided by minority- and women-owned businesses for use by SBA and other agencies in determining which federal contracts should be set aside for small and disadvantaged firms.

Instead, the federal government sets aside contracts which they presume to be within the capabilities of small and disadvantaged firms. This may well be due to the questionable statistics regarding services provided by minority- and women-owned businesses. Unfortunately, a review of this data provided by the Federal Procurement Data Service parallels architectural-engineering data provided by FPDS in its inaccurate listing of such firms and organizations as General Electric, the University of Georgia and Dunn and Bradstreet as minority- and women-owned businesses.

ACEC favors a preferential federal assistance program for small and disadvantaged firms. By establishing a program of goals and set-asides specifically targeted to socially and economically disadvantaged business concerns through direct federal procurement, procurement under grants and subcontracting, SBA could establish a two-tiered system to assist both small and small and disadvantaged businesses.

It is important that businesses be capable of competing for procurement contracts, both in the 8(a) program and in the open marketplace. By establishing rigorous certification procedures to eliminate all but bona fide socially and economically disadvantaged firms from participation in the preferential programs, SBA would establish a more equitable arena for small and disadvantaged firms to bid on contract proposals. The establishment of criteria for both entry and graduation of firms to and from programs designed to assist developing minority- and women-owned firms could more satisfactorily ease firms from the preferential small and disadvantaged programs into the small business programs and, ultimately, into the open marketplace.

The 8(a) program is the only legislative authority to provide business opportunities for socially and economically disadvantaged firms. Therefore, ACEC supports legislative enactment of a preference program for utilization of minority- and women-owned firms.

ACEC believes that all programs for small business assistance should be administered by a single agency. The Small

Business Act, as amended, empowers the Small Business Administration to assist small business. The operation of the Minority Business Development Agency in the Commerce Department is not only unnecessary, but could serve to diffuse the responsibility of the Small Business Administration in assisting small and small and disadvantaged firms. The result of this jurisdictional split is a lack of a cohesive women-owned business policy on the part of both Congress and the Administration. The exclusion of women in the Surface Transportation Assistance Act of 1982's provision requiring that at least ten percent of projects funded by the Act be expended with minority business enterprises exemplifies the diffusion of responsibility created by the current jurisdictional split of programs.

Thank you for providing us with this opportunity to present small business issues of concern to the consulting engineering profession. We look forward to working with the Committee as it addresses these and other small business issues.



INDEPENDENT ELECTRICAL CONTRACTORS INC.
1101 Connecticut Avenue • Suite 700 • Washington, D.C. 20036 (202) 857-1141

STATEMENT OF THE
INDEPENDENT ELECTRICAL CONTRACTORS, INC. (IEC)
BEFORE THE
SENATE COMMITTEE ON SMALL BUSINESS
REGARDING IEC'S
LEGISLATIVE PRIORITIES FOR THE 98TH CONGRESS

FEBRUARY 25, 1983

PRESENTED BY: JOSEPH GRELOCH
NATIONAL LEGISLATIVE CHAIRMAN
INDEPENDENT ELECTRICAL
CONTRACTORS, INC.



INDEPENDENT ELECTRICAL CONTRACTORS INC.

1101 Connecticut Avenue • Suite 700 • Washington, D.C. 20036 (202) 857-1141

My name is JOSEPH GRELOCH. I AM OWNER OF ATLAS ELECTRIC, INC., IN NEWPORT, DELAWARE. I AM APPEARING TODAY ON BEHALF OF THE INDEPENDENT ELECTRICAL CONTRACTORS, INC. (IEC), FOR WHOM I CURRENTLY SERVE AS NATIONAL LEGISLATIVE CHAIRMAN.

IEC IS A NATIONWIDE ASSOCIATION OF ELECTRICAL CONSTRUCTION FIRMS, WITH MEMBERS IN OVER 30 STATES. IEC HAS 22 LOCAL CHAPTERS, IN ADDITION TO ITS HEADQUARTERS OFFICE IN WASHINGTON, D.C. OVER 98% OF IEC'S MEMBER FIRMS ARE SMALL BUSINESSES, AS DEFINED BY GOVERNMENT STANDARDS. IT IS BECAUSE WE REPRESENT SMALL BUSINESSES THAT WE UNDERSTAND HOW IMPORTANT IT IS TO LET OUR CONCERNS BE KNOWN TO OUR ELECTED REPRESENTATIVES, AND WE DEEPLY APPRECIATE THIS OPPORTUNITY.

THE ELECTRICAL CONSTRUCTION INDUSTRY IS THE LARGEST AND MOST HIGHLY SKILLED SUB-TRADE IN AMERICA'S LARGEST INDUSTRY. INDEPENDENT ELECTRICAL FIRMS - WHICH OUR ASSOCIATION REPRESENTS - MAKE UP APPROXIMATELY 75% OF THE LICENSED FIRMS IN THE ELECTRICAL TRADE. WE FEEL THAT OUR CONCERNS ECHO THOSE OF MOST FIRMS IN THE INDUSTRY, AND WE HOPE THE COMMITTEE WILL TAKE ACTION ON OUR REQUESTS.

OUR LEGISLATIVE PRIORITIES ARE BASED ON THE BELIEF THAT SMALL BUSINESSES ARE STILL THE CORNERSTONE OF OUR ECONOMY. THIS BELIEF HAS BEEN ECHOED BY PRESIDENT REAGAN IN HIS ECONOMIC MESSAGES.

ACCORDINGLY, OUR LEGISLATIVE VIEWS FALL INTO TWO MAIN AREAS - THOSE THAT SEEK TO RELIEVE THE UNNEEDED REGULATION AND PAPERWORK BURDENS IMPOSED ON SMALL BUSINESSES, AND THOSE THAT LIMIT THE COMPETITIVE OPPORTUNITIES FOR THESE BUSINESSES.

IN THE 98TH CONGRESS, IEC WOULD LIKE TO SEE ACTION ON THE FOLLOWING ISSUES:

1) REFORM OR REPEAL OF THE FEDERAL DAVIS-BACON ACT

SENATOR, ENOUGH HAS BEEN SAID ABOUT THIS ACT TO WARRANT ACTION BY CONGRESS. THE FACT THAT THE ADMINISTRATION IS NOW IN COURT TO GET ITS PROPOSED REGULATIONS ENFORCED IS PROOF ENOUGH THAT LEGISLATIVE RELIEF IS NEEDED. AS OUR IEC MEMBERS TOLD A SUBCOMMITTEE OF THIS COMMITTEE LAST YEAR, THE PAPERWORK BURDENS ACCOMPANYING THIS ACT CAN ADD AS MUCH AS 15% TO THE NORMAL PAPERWORK INVOLVED WITH CONSTRUCTION PROJECTS. SMALL BUSINESS CANNOT ABSORB THIS COST AND REMAIN COMPETITIVE. THE RESULTING HIGHER COSTS OF FEDERAL CONSTRUCTION IS PASSED ON TO THE TAXPAYER - TO THE TUNE OF OVER \$600 MILLION, ACCORDING TO THE GOVERNMENT ACCOUNTING OFFICE.

THE DAVIS-BACON ACT WAS HATCHED OUT OF THE ECONOMIC PANIC OF THE GREAT DEPRESSION, AND HAS NO PLACE IN TODAY'S CONSTRUCTION MARKET. THE FEDERAL GOVERNMENT IS DEPRIVED OF COMPETITIVE, COST-EFFECTIVE BIDDING ON CONSTRUCTION PROJECTS BECAUSE SMALL FIRMS CAN'T UNDERWRITE THE COST OF COMPLYING WITH DAVIS-BACON'S RESTRICTIONS. THE RESULTING HIGHER BIDS DRIVE THE COST OF FEDERAL CONSTRUCTION PROJECTS BEYOND THE SCOPE OF REASONABLENESS.

IN ADDITION, THOUSANDS OF CONTRACTORS ARE DISCOURAGED FROM EVEN SUBMITTING BIDS, FURTHER LESSENING THE VALUE TAXPAYERS RECEIVE FOR THEIR MONEY ON FEDERAL PROJECTS.

A FINAL POINT ON DAVIS-BACON. THE NEWLY-PROPOSED JOBS STIMULATION BILL PUT FORTH BY PRESIDENT REAGAN - AND SUPPORTED IN PRINCIPAL BY SPEAKER O'NEILL - CALLS FOR A STEPPED-UP LEVEL OF FEDERAL CONSTRUCTION. IEC URGES CONGRESS TO MAKE THIS JOBS PROGRAM STRETCH EVEN FURTHER BY RIDDING TAXPAYERS AND WORKERS OF DAVIS-BACON'S RESTRICTIONS.

II) WORKERS' COMPENSATION

IEC, DUE TO THE HIGHLY TECHNICAL AND POTENTIALLY DANGEROUS NATURE OF ITS MEMBERS' WORK, IS SECOND TO NONE IN ITS DEDICATION TO SAFE WORKING CONDITIONS. HOWEVER, IEC WOULD LIKE TO CAUTION THE CONGRESS ABOUT THE POTENTIALLY DEVASTATING EFFECTS ON SMALL BUSINESS IF PROPOSALS TO FEDERALIZE WORKERS' COMPENSATION PROGRAMS CONTINUE. ONE BILL INTRODUCED LAST SESSION BY REPRESENTATIVE GEORGE MILLER OF CALIFORNIA WOULD ESTABLISH A "SUPERFUND" FOR WORKERS EXPOSED TO ASBESTOS AND URANIUM. THIS BILL, H.R. 5735, HAS THE POTENTIAL OF OPENING UP UNTOLD NUMBERS OF SUBSTANCES TO COVERAGE UNDER FEDERALIZED PROGRAMS. IN ADDITION, H.R. 5735 HAS ESTABLISHED MINIMUM WEEKLY BENEFITS THAT ARE ACTUALLY HIGHER THAN THE MAXIMUM BENEFIT CURRENTLY EXISTING IN TWO STATES.

THE FEDERAL GOVERNMENT'S EXPERIENCES WITH WORKERS' COMPEN-

SATION REVEAL AN INCREDIBLE INCREASE IN COSTS, BOTH IN TERMS OF DOLLARS AND INCREASED PAPERWORK. IEC BELIEVES THE FEDERAL GOVERNMENT HAS A RESPONSIBILITY TO ASSIST BUSINESS IN IDENTIFYING WORKPLACE HAZARDS. HOWEVER, THE VARIOUS STATE WORKERS COMPENSATION PROGRAMS ARE ALREADY IN PLACE TO ASSIST WORKERS EXPOSED TO THESE HAZARDS, AND HAVE SHOWN THEMSELVES VERY CAPABLE OF ADJUSTING TO MEET NEW NEEDS. THE POINT IS, BUSINESS, AND SMALL BUSINESS IN PARTICULAR, HAS SHOWN NO RELUCTANCE TO WORK WITH STATE WORKERS COMPENSATION AGENCIES TO MEET THE NEEDS OF WORKERS IN THE VARIOUS STATES.

WE SINCERELY BELIEVE THAT CONGRESS SHOULD AVOID BURDENING SMALL BUSINESS FURTHER BY DUPLICATING STATE-RUN WORKERS' COMPENSATION PROGRAMS.

IN THE AREA OF ENABLING SMALL BUSINESSES, PARTICULARLY ELECTRICAL CONTRACTORS, TO REMAIN MORE COMPETITIVE IEC HAS THE FOLLOWING AREAS OF CONCERN.

I. RETAINAGE OF FUNDS ON CONSTRUCTION PROJECTS

IN SENATOR WEICKER'S BILL, INTRODUCED LAST SESSION AND SUPPORTED BY IEC, ATTEMPTS WERE MADE TO ELIMINATE OR REDUCE THE WITHHOLDING OF UP TO 10% OF THE PROGRESS PAYMENTS TO CONTRACTORS OF FEDERAL PROJECTS. THIS BILL HAS BEEN STALLED IN THE HOUSE, FOUGHT BY SEVERAL AGENCIES, AND BEEN DELAYED SEVERAL TIMES. IEC HOPES THAT SOME FORM OF RELIEF TO SUBCONTRACTORS, WHO SUFFER THE MOST FROM THIS PRACTICE, WILL BE FORTHCOMING SHORTLY. IT IS IMPOSSIBLE FOR SMALL COMPANIES, WITH LIMITED

CASH FLOW CAPABILITIES, TO CONTINUE TO BID ON FEDERAL PROJECTS AND SURVIVE.

II. COMPETITION FROM PUBLIC UTILITIES

SENATOR, ONE ISSUE IEC HOPES WILL BE ADDRESSED BY CONGRESS CONCERNS THE GROWING RATE OF INSTANCES OF UTILITY COMPANY INFRINGEMENT ON SERVICES NORMALLY PROVIDED BY CONTRACTORS. IEC WOULD REQUEST THAT THE CONGRESS BEGIN HOLDING FORMAL HEARINGS ON THIS ISSUE AS SOON AS POSSIBLE.

PUBLIC UTILITIES ENJOY A PROTECTED COMPETITIVE STATUS IN THE ENERGY FIELD. HOWEVER, MORE AND MORE UTILITIES ARE SELLING AND INSTALLING HEATING, PLUMBING, COOLING AND ELECTRICAL APPLIANCES AND DEVICES. THIS PRACTICE IS NOT ONLY DANGEROUS IN ITS ANTI-COMPETITIVE IMPLICATIONS, BUT SERVES TO DO LONG-TERM HARM TO THE COUNTRY'S ENERGY POLICY. THE SMALL BUSINESSES THAT MAKE UP IEC AND OTHER SUBCONTRACTING FIRMS ARE FORCED TO LAY OFF WORKERS WHEN UTILITIES DO WORK NORMALLY PERFORMED BY CONTRACTORS, FURTHER ADDING TO AN ALREADY HIGH UNEMPLOYMENT RATE.

SENATOR, THESE ARE THE MAIN ISSUES OF CONCERN TO IEC IN 1983. THERE ARE OTHER ISSUES WE'D LIKE TO SEE ADDRESSED - INCLUDING HEARINGS ON H.R. 4884, A BILL TO RESTRUCTURE THE DEPARTMENT OF LABOR'S BUREAU OF APPRENTICESHIP AND TRAINING. IEC'S FULL POSITION ON THIS AND OTHER ISSUES IS PRESENTED IN GREATER DETAIL IN OUR WRITTEN STATEMENT.

IN CONCLUSION, IEC WISHES TO AGAIN THANK THE COMMITTEE FOR

INVITING US TO PARTICIPATE IN THESE HEARINGS. IEC STANDS
READY TO ASSIST THE CONGRESS IN ITS EFFORTS TO HELP SMALL
BUSINESSES, AND WOULD LIKE TO OFFER YOU AND YOUR STAFFS ANY
INPUT YOU MIGHT DESIRE.

THANK YOU.



EUGENE J. WINGERTER
EXECUTIVE DIRECTOR

National Solid Wastes Management Association

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TELEPHONE (202) 659-4813

Statement Before the

United States Senate
Committee on Small Business

on the

1984 Legislative Agenda

Presented by:

Arleen Shulman
Federal Affairs Manager
NATIONAL SOLID WASTES MANAGEMENT ASSOCIATION

February 25, 1983

- Institute of Waste Technology
- Waste Haulers Council
- Sanitary Landfill Council
- Liquid Waste and Sludge Transporters Council
- Waste Equipment Manufacturers Institute
- Institute of Waste Equipment Distributors
- Institute of Chemical Waste Management
- Institute of Resource Recovery
- International Council of Waste Service Industries

We are glad to have been invited to participate in this hearing and commend you for providing such a free-form opportunity to bring several specific matters to the Committee's attention.

The National Solid Wastes Management Association represents the waste service industry. The vast majority of firms in the industry are small refuse collection firms and it is their interests we are conveying to you today.

We have two separate issues to discuss, the first a legislative one although not under the jurisdiction of this Committee, and the second a matter for your oversight.

Occupational Protection for Refuse Haulers

As you probably know, the federal hazardous waste law is up for reauthorization, under the jurisdiction of the Environment and Public Works Committee. The intent of proposed amendments to that law is to close several of the loopholes in the regulation of hazardous waste that have been created by what we believe to be improper implementation of that law.

One of those loopholes is the so-called "small quantity generator" provision which allows generators of hazardous waste producing less than 1,000 kilograms or 1.1 tons of hazardous waste per month to be

exempt from regulation. This hazardous waste can now be legally mixed with ordinary refuse and put out in a bin for disposal to be picked up by a private or municipal refuse collector.

Members of our industry have had drivers and loaders severely burned by small quantities of acids or inflammable wastes while loading this contaminated waste or during landfill compacting operations. We've had equipment destroyed. And our members can report numbers of near-misses -- accidents narrowly averted. One small business firm reported that he could be totally wiped out by such an accident since he often must park half-loaded trucks in his garage.

The solution seems obvious. All generators of hazardous waste must be required to segregate hazardous waste from ordinary refuse and to notify the waste transporter who will be handling it that it is indeed hazardous. Just such a remedy is being considered by the Environment Committee.

We bring this to your attention for two reasons. First, to make the point that in vigorously pursuing this issue, NSWMA has been representing small businesses, and second, to allay any fears that some federal regulation of this hazardous waste will be inordinately burdensome on these generators, some of which are small businesses. We have been meeting with representatives of affected business sectors for months to meet the specific implementation concerns such as "how does a business know it produces a hazardous waste?"

The small businesses providing commercial refuse collection services don't want to be in the hazardous waste business, and believe that they have a right to know when hazardous waste is involved so they can make occupational and environmentally sound decisions on its management. Conversely, all generators of hazardous waste, whether or not they are small businesses, need to take some responsibility for this national problem -- at least for the part they directly cause.

Opportunities for Federal Procurement

We are certainly aware of this Committee's continuing interest in encouraging small business opportunities for federal procurement. Over 90% of the federal refuse collection contracts in 1980 were awarded to small businesses, so they have quite a stake in federal procurement.

We would like to add our voice to other small business groups who are concerned that existing procurement policies, especially in DOD and proposed revisions to the A-76 cost comparison process for contracting out may explicitly reduce small business involvement. Umbrella, or consolidated contracts cannot provide the same fair, advertised contracting opportunities as subcontracting under a huge conglomerate. The prime contractor may decide to perform the activity in-house that was previously contracted to a small business, or as in one case, ask a small firm to prepare a bid used in a submission and then turn around and only offer the subcontract at a very reduced price. Incidentally, even our large members can never hope to bid as a prime

contractor on a contract that lumps refuse collection with pest control, housing rehabilitation, food service, etc.

The last issue is one of desperate and immediate concern and that is the size standard problem. Many of our small firms are outgrowing the existing size standards because their costs which are passed on to customers have zoomed, though their "size" hasn't changed. They will have to abandon federal contracts even though they may be again defined as small once SBA changes the standard. While the revenue-based size standard for our industry hasn't been revised for seven years, inflation certainly has zoomed. The refuse collection firm's costs, a pass-through cost figuring in calculation of its "size", have increased even faster since environmental legislation has made no-cost or cheap disposal of waste a thing of the past. And that's all taken place since the federal law was passed in late 1976. Disposal costs have increased about 350% since our size standard was revised and disposal pass-through costs comprise about 20-25% of a typical small firm's revenues.

We joined many other groups about a year ago in urging SBA to issue an across-the-board interim inflation update. When that was quashed by OMB, we pursued our own case with the Agency. All while SBA was tortuously wending its way through one ANPR after another ANPR. Now we understand SBA is ready for a proposal that, I was told, is for many industries an inflation update. We know the levels of actual size standards is fraught with controversy. We believe, however,

that the longer we let SBA delay in promulgating something, the more unfair the revenue-based standards become. We hope this Committee will not permit further delay of either the proposal or the effective date of final changes.



National Association of Manufacturers

TESTIMONY
ON BEHALF OF
NATIONAL ASSOCIATION OF MANUFACTURERS
PRESENTED BY
DANIEL W. CANNON
NAM DIRECTOR OF ENVIRONMENTAL AFFAIRS
BEFORE THE
COMMITTEE ON SMALL BUSINESS
UNITED STATES SENATE
FEBRUARY 25, 1983



1776 F Street, N.W. • Washington, D.C. 20006 • (202) 626-3700

TESTIMONY
ON BEHALF OF
NATIONAL ASSOCIATION OF MANUFACTURERS
PRESENTED BY
DANIEL W. CANNON
NAM DIRECTOR OF ENVIRONMENTAL AFFAIRS
BEFORE THE
COMMITTEE ON SMALL BUSINESS
UNITED STATES SENATE
FEBRUARY 25, 1983

This testimony is presented on behalf of the National Association of Manufacturers (NAM). I am Daniel W. Cannon, NAM Director of Environmental Affairs.

NAM is a voluntary association of more than 12,000 enterprises engaged in manufacturing in the United States, and is affiliated with an additional 158,000 companies through its Associations Department and the National Industrial Council. The overwhelming majority of these companies are small business enterprises.

We appreciate the opportunity to appear before the Senate Committee on Small Business at a hearing held to

consider the Committee's 1983 agenda. I am here for the single purpose of urging that the problems of small business in achieving compliance with environmental laws and regulations be included in that agenda.

There are three major problems in this area:

- ° Getting sufficient input from the small business community into the regulatory development process.
- ° Disseminating information in an understandable form as to the fact that a regulation has been promulgated requiring the achievement of certain standards.
- ° Disseminating information as to what technical and financial aids are available to assist small business in achieving these standards.

There is general agreement that the principal cause of noncompliance by small business is a lack of communications and information. I need not relate to this Committee the inherent handicaps of small business--insufficient resources, personnel and expertise, plus inability to achieve economies of scale--and the great contributions of small businesses as the providers of at least 50 percent of all new jobs, producers of half of the Gross National Product, originators of a myriad of innovations, and suppliers to large corporations which could not survive without them. Many small businesses succeed and grow; many die an untimely death. Fortunately, our country has a multitude of entrepreneurs who keep on trying.

Federal environmental laws are extremely complex, both legally and technically. They represent an effort by the Congress to legislate in the field of engineering. The

resulting regulations can be baffling.

Just by way of illustration, several years ago a small businessman visited NAM asking for assistance in making a visit to the headquarters of the U.S. Environmental Protection Agency (EPA). He had received a notice from the Enforcement Division of the EPA Regional Office in Chicago that he had failed to apply for registration as a pesticide under the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) of a kitchen water tap clarifier which he manufactured. He was completely baffled.

We arranged to visit the Office of Pesticides and Toxic Substances at EPA headquarters. It turned out that, in order to prevent bacterial buildup in his clarifier he used a tiny amount of silver particles in the charcoal filter. Under FIFRA, "pesticide" is defined to include any substance intended for mitigating any "pest", and "pest" is defined to include bacteria as well as any other form of plant or animal life. After discussing this interpretation for an hour, we were referred to the EPA Office of General Counsel in another building where we spent another hour before being referred to the Office of Enforcement in still another building. The ultimate decision was to refer the matter back to the Enforcement Division in the EPA Regional Office in Chicago. After three hours and three buildings, we accidentally wound up in the garage before emerging into the sunlight, where the small businessman shook his head and said "The average person would not believe!"

EPA has made considerable progress since that time. The establishment of an EPA Small Business Ombudsman by EPA Administrator Anne Burford on February 22, 1982 was a milestone in this progress. Much of my work consists of handling problems telephoned in by member companies. The Office of the Small Business Ombudsman has greatly facilitated getting the problems referred to the proper EPA specialist who can come up with the right answer or information. On February 2, 1983, I participated in an EPA Small Business Conference at which Ombudsman Marc Jones convened all the newly appointed Small Business Liaisons from EPA's ten Regional Offices. They discussed small business problems with panels of representatives of small business and industrial companies and associations. Much emphasis was placed on attaining visibility among the small business community and establishing effective communications. As a matter of information, a list of the EPA Regional Small Business Liaisons is attached to this testimony. Although this is an auspicious beginning, some monumental work lies ahead if we are ever to bridge the gap between the Federal Register and the small business community. Therefore, we respectfully urge this distinguished Senate Committee on Small Business to include in its 1983 agenda the problems involved in achievement of small business compliance with environmental laws, and regulations.

EPA REGIONAL SMALL BUSINESS LIAISONS

BOSTON	Paul G. Keogh	671-223-5424
NEW YORK	Kenneth Eng	212-264-4711
PHILADELPHIA	Paul Ambrose	215-597-3658
ATLANTA	George Harlow	404-881-3454
CHICAGO	Kathy Brown	312--353-3299
DALLAS	Gerald Nehrman	214-767-0891
KANSAS CITY	Ron Ritter	816-374-6201
DENVER	Charles R. Stevens	303-837-3711
SAN FRANCISCO	Melanie Blaha	414-974-8014
SEATTLE	Anita Frankel	206-442-1356



Senator Weicker, Senator Nunn members of the Committee

Thank you for this opportunity to provide some input into this session of the Senate Small Business Committee.

The Association of Independent Corrugated Converters represents a majority of the approximately 750 independent owner operators of container plants across the United States. As a part of the corrugated shipping container industry, the independent converter is confronted with an ever present threat to his survival. The industry is divided into integrated (paper mill owning) and independent (non-mill owning) container manufacturers. Current sales of corrugated products are ten and one-quarter billion dollars annually. Approximately 80 percent is sold by 36 integrated companies. The remaining 20 percent is divided among 750 to 800 independent converting operations.

Moving back one link in the supply chain there is only one independent virgin kraft liner board mill operating in North America. I mean by independent a mill whose entire output is sold on the open market. The effect of this concentration in both raw material manufacture and product conversion results in the independent companies remaining in business at the sufferance of their integrated competition. The independent must purchase his raw material from companies with whom he competes for a part of the container market. Container manufacturing does not provide economies of scale. Corrugated containers are manufactured on an as needed basis and are usually delivered less than one hundred miles from the manufacturing plant. No company or segment of the industry enjoys any technologically derived competitive advantage. The methods of manufacture are common to the industry and order processing is the same for both the integrated and independent plant.

There are, however, "up stream" advantages which accrue to the integrated companies and which could affect their cost/price actions. For example, typically the integrated companies form a subsidiary corporate entity which harvests and sells the pulpwood to their own mills. This usually generates a profit on which a capital gains tax rate is levied. Additionally, integrated companies receive a timber depletion allowance which, in conjunction with the pulpwood transfer, substantially reduces their aggregate corporate tax. Neither of these practices is in any way illegal and both, I am sure, contribute to the reforestation programs of one of our important natural resources.

The independent corrugator plant, or sheet plant, however, starts with the purchase of linerboard in either roll or combined sheet form. He must manufacture and market the container and realize a profit exclusively from its sale. He must remain innovative and product-oriented, providing superior service and package design to his customers. This, I can state with assurance, he does extremely well.

We do not seek nor need restrictive legislation directed toward our integrated competitors. We are a responsible part of an important industry and wish to remain viable. We are not looking for federal relief which would provide us with a competitive advantage. The facts show that the container business is essentially a job shop, service and product oriented industry. As independents and part of the corrugated container industry, we want an equal opportunity to succeed or fail in the market place. We seek parity in the distribution of the necessary raw material purchases at fair market prices.

Thirty years ago the corrugated container industry consisted of 85 to 90 percent independent converters and 10 to 15 percent integrated companies. As I have already stated this represents an almost complete reversal today. We, as independent converters, are a classic example of commercial concentration resulting in dual distribution with all the potential free trade limitations it implies. We understand our plight and will pursue every legitimate means to not only survive, but flourish as part of the American business scene.

We request all legitimate legislative assistance which can be made available to address the issue of dual distribution and the potentially destructive predatory business practices which result.

Respectfully submitted,

ASSOCIATION OF INDEPENDENT
CORRUGATED CONVERTERS

By J. Richard Troll
J. Richard Troll
Executive Director

DOOR AND HARDWARE INSTITUTE

February 16, 1983

Honorable Lowell Weicker
Chairman, U.S. Senate Committee
on Small Business
Russell Office Building
Washington, DC 20510

Dear Chairman Weicker:

On behalf of the Door and Hardware Institute (DHI), I wish to thank you for the opportunity to participate in the Committee's planning session for the 98th Congress.

First, tax policy remains an important issue for us. It appears small business will be fortunate to hold on to past reforms as the pressure mounts to increase tax revenues. However, we do not believe such concerns should divert us from the task of creating a fair and equitable tax policy.

A general, broad-based job tax credit is needed to fuel job creation and reduce unemployment. For far too long we have skewed our tax-incentive policy in favor of capital-intensive firms. If our tax policy is to be used as a tool for economic growth, the incentives must be properly distributed among all sectors of the economy. A job tax credit will not only benefit small labor-intensive firms, but will create jobs more quickly than any other non "make work" jobs program. Further, we believe application of the credit against payroll taxes and refundability will ensure its immediate use.

Second, we believe there is a need to encourage more investment in small firms. The participating debentures promoted by you as chairman of this committee, or a deduction for stock purchases in small firms, would help achieve this goal.

Third, reform of the Social Security systems is a must, and small business must assert itself to ensure equitable distribution of responsibility for its rescue. Payroll tax is the most serious hindrance to the cash flow of a small business.



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Increases in new payroll taxes or further acceleration of previously scheduled increases will most surely drive many more small businesses to bankruptcy.

Fourth, government procurement policy must be the subject of continuing reform. The government must implement a policy of reliance on the private sector for the goods and services it requires. We urge the committee to take an aggressive role in pursuing legislation to this effect. This is one way small firms can help the government reduce the size of the budget deficit and contribute to the job creation process.

We certainly appreciate your efforts in the last Congress to eliminate the burdensome practice of retainage in construction projects. The practice has severely hindered the ability of contractors and material suppliers, such as ourselves, to maintain cash flow. At the same time, retainage contributes nothing to the completion of a project to the government's satisfaction. We hope you and Senator Nunn will continue to work for this reform.

Fifth, product-liability reform will bring some order to an area riddled with inconsistency and uncertainties. We hope the Committee will ally itself with the efforts of Senator Kasten, a new member of the Small Business Committee, in this matter.

Sixth, we believe we cannot be lulled into a false sense of security as a result of recent declines in interest rates. We must examine whether long-term reforms are necessary to ensure that consideration of the impact of monetary policy on small business is given proper weight in the appropriate policy-making forums.

Seventh, we continue to be concerned about the acquisition and merger fever of big business. We remain skeptical that large-scale diversification leads to economic efficiency. We fear that such policies put undue strains on credit markets to the detriment of small business and damage the competitive nature of the marketplace.

Eighth, there remain many government-created barriers to small business growth. We hope your Committee will plan an active role in the opening efforts for comprehensive regulatory reform and will work to eliminate burdensome regulatory barriers in appropriate agencies.

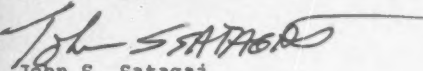
Ninth, although there have been significant advancements, small business' potential in the export market remains underutilized.

Tenth, we sense a need to bring into focus the role of the federal government in aiding small business whether it be through

loans, procurement assistance or advocacy. The President's State of Small Business Report and the work of the committee should offer new direction in this regard.

These are just some of the issues we see before us this Congress. We look forward to a fresh approach to the needs of small business and stand ready to provide whatever assistance we can offer.

Sincerely,


John S. Satagaj
General Counsel

JSS:dc

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Peter W. Schwartz
Executive Vice President

Statement of the
American Supply Association
Before the
Senate Committee on Small Business

Presented By
Patrick C. O'Connor
February 25, 1983

Mr. Chairman and members of the Committee, I thank you for extending the invitation to the American Supply Association to present our legislative priorities to this Committee.

My name is Patrick O'Connor and I am the Washington Representative for the American Supply Association. ASA is the single, national association representing wholesalers and distributors of plumbing, heating, cooling and piping products and systems. The 3,000 members of ASA, representing 4,000 business locations in all fifty states, are primarily the owners and managers of small, family-owned businesses. Ten regional associations comprise the ASA. A list of these regional associations is attached to the testimony.

The customers of the p-h-c-p wholesalers are contractors, retailers and commercial and industrial users of heating and cooling systems. The wholesaler is an integral part of our economy's distribution system which moves products from the manufacturer to the end-user.

The Government Affairs Committee of ASA, chaired by Mr. T. E. Norton, Paine Supply Co., Jackson, Mississippi, has set the legislative priorities for the Association. The Government Affairs Committee has asked me to discuss these priorities with you.

Utility Competition

At their recent annual convention, the Board of Directors of ASA passed a resolution calling on the Congress to hold hearings on the business practices of gas and electric utilities. In the last several years, the regulated gas and electric utilities have ventured from the production and distribution of energy into the merchandising and installation of p-h-c-p products and systems. Many utilities now offer homeowners hot water heaters, air conditioners and furnace improvements, to name just a few. This activity has adversely impacted the business of many wholesalers and contractors in our industry. As businessmen, we do not oppose fair and open competition. We welcome such competition, for it strengthens our industry. But, we do oppose the unfair and anti-competitive nature of utility business practices in our industry.

Utilities often subsidize their sales to consumers through their utility rates. A utility's rate structure absorbs many of the research, development, administrative, marketing and product costs. Often a utility will sell a product below cost and pass through the loss to all ratepayers. With access to virtually every household, the utility also enjoys a massive marketing advantage. In many cases, a utility enters the market not with

the intent of making a profit, but rather to stimulate conversion from one fuel source to another or to increase demand for energy use.

In January of this year we wrote to the members of the Committee asking that hearings be held to determine whether present laws are being violated, whether appropriate action is required by Federal agencies and if corrective legislation is needed. We are again requesting that this Committee consider holding such hearings. The American Supply Association and others stand ready to work with your staff on this critical problem.

We are particularly concerned that the DOE Residential Conservation Service Program and the Commercial and Apartment Conservation Service Program adversely affect the ability of small firms to compete. Although the NECPA does provide some protection for small businesses from adverse effects of the RCS program, DOE's deregulatory attitude has, unfortunately, allowed utilities in many localities to seize an unfair competitive advantage.

The Energy Security Act, which authorizes the CACS program, provides no protection for small firms. In the proposed rule implementing the program, DOE has decided that no restrictions should be placed on utility supply and installation of CACS measures. Attached is a copy of our testimony which was presented to DOE on January 19, 1983, which will identify for your the specific problems with CACS.

We request that Congress enact the necessary legislation to ensure that the RCS and CACS programs do not upset the competitive marketplace. In the absence of such action, we support repeal of both programs.

Multi-Employer Withdrawal Liability

The Multi-Employer Pension Plan Amendments Act of 1980 has proven to be a colossal mistake. The Act creates a withdrawal liability provision requiring employers who leave a plan to pay their share of the unfunded vested liabilities of the plan. An employer can be socked with a withdrawal liability equal to 100% of his net worth. This amount is not, however, the amount that the employer agreed to contribute in his collective bargaining agreement, but is based on a projection of what would be due in benefits upon retirement should pension investments and future contributions fail to make up current shortfalls. And, the provision does not only apply to those "bailing out" of a failing plan, but a host of other business events, most of which are well beyond the intent of the law. An ASA businessman cannot retire, permit a change of unions, move his business out of a certain location, or sell his business without the potential risk of an unfunded liability "due and payable" of even greater than his company's net worth.

In the 97th Congress, ASA testified before the Senate Labor Committee in support of Senator Hatch's bill S. 1748. Unfortunately, no action was taken on that bill. We urge the Congress to move rapidly towards a solution of this problem.

Product Liability

The role of product liability law is to provide restitution to buyers of faulty products or the victims of negligently-made equipment. We do not

ask to turn back the clock. What ASA does seek is some level of uniformity and fairness in a process that has tremendous impact on our businesses. We want certainty in the application of product liability and equity in its enforcement. ASA members want to know where they may be liable and they want to be secure in the knowledge that the law is fair.

The host of state statutes in this area creates the fundamental problem with existing law. "Product liability" incorporates a variety of areas in the law from negligence to breach of warranty to strict liability in tort. When multiplied by fifty different statutes in each of these areas, standards vary, liability attaches and confusion reigns.

An ASA wholesaler may distribute in several states but, more importantly, he is certain to handle products manufactured in a great number of states. The p-h-c-p wholesaler is faced with the application of a potentially different series of product liability statutes in every single jurisdiction where he does business, where his products are manufactured and where p-h-c-p equipment is shipped. Unlike many products where the potential for product liability the actions are limited, the nature of our products make them prone for application of these statutes.

The answer then is to establish one body of law upon which the consumer, manufacturer and wholesaler alike can rely, to establish the groundrules for product liability in federal law and apply the law uniformly.

Some may view this as an intrusion on the states' prerogatives -- we think not. Product liability is not a states' rights issue; it is an interstate

commerce issue. The problems created by application of multiple statutes which in turn hamper trade among the states lies at the very core of why the drafters of the Constitution included an interstate commerce clause: to give businessmen the assurance they need in order to conduct their business across state jurisdictions, wherever a uniform approach is necessary.

ASA believes that such a uniform approach has become necessary. We, therefore, urge the Congress to take swift action on S.44, the Product Liability Act, introduced by Senators Baker and Kasten.

Housing Policy

The recession has seriously eroded the business of p-h-c-p wholesalers. A primary cause has been the slump in new housing and building construction. As the economy shows a glimmer of recovery, we implore the Congress to stimulate this recovery, not to dampen it. We are particularly concerned that changes not be made in the tax code which would undercut the recovery in housing and construction.

Social Security

Wholesaling is labor intensive rather than capital intensive. In determining the best course of action for meeting revenue shortfalls in the Social Security System, we wish to express our concern about relying too heavily on a "head tax." We share the belief that something must be done, but we urge that caution be exercised.

Sales Representative Contracts

We continue to oppose any legislative intrusion into the contractual relationship between wholesalers and sales representatives.

Chlorofluorocarbons (CFCs)

CFCs are used in the p-h-c-p industry as the heat transfer agent in refrigeration and air conditioning. Unwarranted and premature regulation of CFCs could have a severe impact on p-h-c-p wholesalers' access to supplies needed to serve our customers. Any Clean Air legislation should provide a responsible resolution of the issue of whether CFCs deplete the ozone layer.

Mr. Chairman, this concludes my statement. Again, I wish to thank you for providing this forum to ASA and other small business organizations.

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Executive Vice President

Statement of the
American Supply Association
before the
U.S. Department of Energy
Office of Conservation and Renewable Energy
for the
January 19, 1983 Public Hearing
on the
Proposed Regulations for the
Commercial and Apartment Conservation Service Program
(CAS-RM-80-125)

Presented by:

Patrick O'Connor
For the Government Affairs Committee
T.E. Norton, Chairman

My name is Patrick O'Connor and I am here today to present the comments and recommendations of the Government Affairs Committee of the American Supply Association.

ASA is the national association which represents wholesalers and distributors of plumbing, heating, cooling and piping products and systems. Many ASA members are also involved with solar heating and cooling. The three thousand members of ASA are located in every state and are organized through ten regional associations.

The customers of ASA members are the contractors that install p-h-c-p equipment, as well as commercial and industrial users. The wholesaler-distributor is an expert in his field, with an extensive knowledge of the needs and requirements of both his customer and the end-user.

I am here today to comment on the proposed regulations for the CACS program because many of the energy conserving measures as well as the O&M procedures specified in the proposed rule are supplied by the p-h-c-p wholesaler.

Competition

At the outset, I would like to make it clear that ASA has opposed both the RCS and CACS programs, and has supported legislative attempts to repeal the applicable sections of NECPA. We feel that the private sector is well suited to provide for the energy conservation needs of the country without the necessity of a federally mandated program.

Additionally, the evidence bears out the fact that RCS, and now CACS, has provided further incentives to the gas and electric utilities to acti-

vely engage in the merchandising and installing of p-h-c-p products and systems.

Gas and electric utilities are increasingly competing directly with suppliers and contractors. The competitive advantage that the utility can bring to the p-h-c-p marketplace is awesome. The utility is a regulated monopoly with a guaranteed rate of return. The utility can rely on its rate structure to finance and subsidize outside ventures. The utility's incentive for cross-subsidization is both an attractive one as well as one that has more and more been tolerated and encouraged by state regulatory commissions. We believe that utility business practices in the p-h-c-p market are often anti-competitive in nature, detrimental to the public interest and in conflict with this country's energy policy. It is our hope that the CACS program will not further aggravate an already serious problem.

Impact of CACS Regulations

As stated on page 13 of the November 1982, "CACS Preliminary Regulatory Impact Analysis", a goal of DOE in the revised regulations is to "implement the CACS Program with minimum regulatory burden and maximum state flexibility, while insuring that utility conservation programs do not hinder competition." ASA supports these goals and applauds DOE for its efforts. However, we feel that in several instances in the proposed regulation that the Department has hindered competition in its attempt to provide flexibility and to minimize the regulatory burden. Where this occurs, we believe changes can and should be made, changes which would not compromise any of your goals or adversely impact any of the parties involved.

We are here today, realizing that the DOE has the responsibility to move forward with this program as the Congress has not taken action to repeal the program, to work with you and others for the development of a successful and beneficial program.

Recommendations

1. Regulatory Flexibility Analysis

We strongly believe that the Department has erred in its finding that a regulatory flexibility analysis is not required. Your conclusion that an analysis is not necessary because the program does not impose any requirements on small entities is in conflict with the Regulatory Flexibility Act of 1980. The Act requires an Initial Regulatory Flexibility Analysis to be prepared when a significant number of small businesses will be economically impacted. The Act does not allow an agency to make its decision based solely on which entities a regulation imposes requirements. You have to consider the economic impact on all parties affected by the regulation.

As the Department states at 4.4.1, page 52, of the "Preliminary Regulatory Impact Analysis": "The following industries are expected to be most effected by the CACS program: insulation and storm window and door manufacturers, suppliers and contractors; and heating and air conditioning suppliers and contractors." All these industries mentioned are primarily small businesses in nature.

We urge the Department to reverse its decision and to proceed with an Initial Regulatory Flexibility Analysis. Otherwise your stated goal of minimizing regulatory burden is in conflict with your decision.

2. Audit Announcement

The proposed rule removes the prohibition against advertising in the audit announcement. Instead the states will have the flexibility to allow advertising of both CACS and non-CACS procedures and measures

Your proposal clearly will have an anti-competitive impact. States would be able to allow the utility companies to utilize the audit announcement to advertise products and services which may have no relationship to the CACS program.

We oppose the proposal and feel that the original prohibitions, included in the January, 1981 proposed regulation, should be retained. We don't believe a prohibition on advertising would limit the flexibility of States nor would it impose a regulatory burden on the utility companies. To allow utilities to advertise far exceeds the intent of the Congress.

There are two points that I would like to bring to your attention. The first is that nowhere in the preamble or the rule, when discussing advertising, are states urged or required to ensure that, if utilities do advertise, it must be done in a fair and non-discriminatory fashion. Secondly, because the states are

directed to treat all costs associated with audit announcements as current expenses and charged through the rate structure, all ratepayers will be paying for the utility's advertising in the audit announcement.

Not only is this a clear case of ratepayers picking up the cost for the utility to compete with a supplier or contractor, it also is an example of ratepayers incurring an additional cost - not required by any law - because of a federal regulatory program.

3. Addition of New Procedures and Measures:

We would urge that the language in §458.306(1)(4), the section which allows the State to add additional measures and procedures without DOE approval, be amended by adding:

"The addition of additional programs, measures and energy conserving O&M procedures are subject to the notice, comment and public hearing provisions of §458.203."

Additionally, we would like to see §458.203 amended to specify, "submission of a State Plan or amendments to a State Plan." These two clarifications make it certain that additions will be subject to public review, and will aid in avoiding possible conflicts when the program is implemented.

4. Results of An Audit, Arranging of Services

We believe that problems will develop if an auditor is allowed by the State Plan to recommend a supplier or contractor, particularly when there is a financial relationship between the

auditor and the utility company. The problem is magnified if the audit procedures are to be kept "loose" for the states and utilities.

NECPA does not require the utility to arrange service. In light of this, we recommend that the auditor not be allowed to recommend a supplier or contractor. As DOE presumes correctly in the preamble to the January, 1981 CACS proposal: "Customers eligible under the CACS Program are more accustomed to arranging their own services." In those instances where a customer requests guidance, the proposal provides that information on how to obtain more specific information on the purchase and installation of measures would be provided. The only beneficiary of the auditor being allowed to recommend would be the utility which engages in supply and installation activities. For those utilities not wanting to engage in supply and installation, the State Plan could impose a regulatory burden by requiring that they make such recommendations. Suppliers and contractors will be adversely impacted because of the inherently discriminatory nature of referrals.

5. Access to Audit Results

The contents of the audit report would be a valuable marketing resource for suppliers and contractors, as well as those utilities which have their own sales and installation programs.

Either the audit reports should be available to everyone on a non-discriminatory basis or not available, except to the present and future owner or tenant of the building audited.

The least burdensome alternative for both the utility and the suppliers and contractors, would be that no one be allowed access to the contents of the audit report. We would propose that the states, in the State Plan, be required to prescribe steps to ensure that the audit information is not made available by the utility to any subsidiary or internal division of the utility engaged in the sale or installation of plumbing, heating or cooling equipment or systems.

This recommendation will provide some guarantee that no single entity is unfairly advantaged because of the CACS program.

Conclusion

Businesses, large and small, have for years been adversely impacted by overly stringent regulations. The task of lessening this burden while meeting the intent of the law is a formidable one. The Department of Energy and all other federal agencies must be cautious that when easing the burden for one group that you don't, in your zeal, adversely impact others. The CACS program has the potential of upsetting free and open competition in many communities if the Program directly or indirectly sanctions utility involvement in the p-h-c-p market.

The writing into the CACS regulations of specific guidelines and limits on the scope of utility supply and installation activities is neither in conflict with NECPA nor incompatible with your goal of minimizing the regulatory burden.

I thank you for allowing the American Supply Association the opportunity to appear at this hearing.



**AMERICAN ASSOCIATION
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March 15, 1983

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The American Association of Minority Enterprise Small Business Investment Companies (AAMESBIC) is pleased to have this opportunity to present its legislative priorities to the Senate Small Business Committee.

The MESBIC industry presently consists of approximately 127 companies specializing in investments in minority-owned small businesses. Over the past nine years, these companies have invested in excess of \$260 million in well over 4,200 minority concerns. In terms of employment, the industry has maintained and created over 52,000 jobs in the past five years. Because many of our portfolio businesses are located in inner-city, high unemployment areas, a high number of the jobs we create are in those sectors of the economy with the highest unemployment rates.

In recognition of the MESBIC industry's accomplishments, the industry received the needed financial support of Congress through 100 appropriations in each year from the program's inception until 1982 when appropriations for funds exceeded appropriations. This situation was corrected in 1983 with a funding increase. In 1983, however, the industry was not in the position of being able to receive the needed increase in funding. From the budget, 10 new direct appropriations totaling \$100 million were recommended with Congress recommending that the MESBIC funds were once again included in the budget. Consequently, in 1983, both the Administration and Congress recommended considerably less money in MESBIC funds, although the program was ultimately placed under a continuing resolution at the last minute. Currently, the Administration and Congress are once again recommending an increase in funds for the MESBIC program. We have learned from past experience, however, to be cautious as to what the final outcome of the budgetary process will be. We therefore ask for the committed support of the Senate Small Business Committee in obtaining increased appropriations for the MESBIC industry in the coming year. Your support will not only help MESBICs finance the deals they negotiate this year, but will give the industry a more solid foundation on which it may attract additional private capital.

Also in regard to Small Business Administration leverage, AAMESBIC has been striving to obtain legislative action on a matter concerning a recent change in SBA policy. We brought this matter to your committee's attention in previous testimony. In July of 1980, the Comptroller General issued a decision that public funds invested in MESBICs should not be leveraged as private capital. The SBA immediately adhered to this decision, although it has a regulation in place which was contrary to the ruling. Specifically, the regulations called for the consideration of public funds invested in MESBICs as private capital for the purposes of leveraging. The Association feels that, due to the existing SBA regulation and the SBA's past history of public funds leverage, the SBA should agree to consider as eligible for leverage at least those funds invested in MESBICs prior to the Comptroller General's decision. Those funds were invested based on the legitimate expectation that they would be eligible for leveraging. Had the investors known that the provision for public funds leverage would be revoked, it is entirely possible the funds would have been used for other purposes.

In November of last year the U.S. District Court of the District of Columbia ruled in favor of public funds leverage. The SBA, however, intends to appeal that decision. For this reason, it has become increasingly apparent that definitive legislative action should be taken to solve this issue.

Last year the House Small Business Committee attached a public funds leverage amendment to the SBA authorization bill, which was eventually approved by the full House. We hope that the same will occur this year in both chambers of Congress.

In 1980, it was shown that most SBICs do not achieve profitability until they have an investment portfolio outstanding of at least \$1,500,000. For most MESBICs, achieving that level of investment depends on having a minimum of \$500,000 in private capital and two tiers of SBA leverage. Undoubtedly, the minimum figure of \$1,500,000 has risen in the past three years.

Unless profitability is positively achievable, MESBICs will not be able to attract additional capital contributions for new or old investors on a financial basis. And unless additional capital is obtained, profitability can not be achieved.

The American Association of MESBICs is greatly interested in providing for the continued development of its members and small businesses. We believe that it is necessary to overcome this funding problem by creating an incentive for corporations to further participate in the MESBIC program. We propose that a MESBIC investment tax credit be instituted to provide a tax credit for purchases of original issue equity securities of licensed MESBICs. Such a tax credit would provide an immediate financial reward to a corporation for its investment and would tend to offset the investment's illiquidity during the four to seven year period necessary for a MESBIC to achieve the critical mass necessary for profitability.

The Association is also proposing a tax deduction as part of already-existing legislation. Although the concept of an Urban Jobs and Enterprise Zone has become quite popular with the Administration and a large number of Congresspersons, the complexity of formulating the actual details of such a program has prevented past enterprise zone proposals from being approved.

One of the major weaknesses in past proposals has been the general lack of capital-generating provisions. Along these lines, the American Association of MESBICs is proposing a tax deduction to MESBICs and SBICs investing in businesses located in enterprise zones. These companies have extensive experience in dealing successfully with small businesses. As the Association pointed out in its testimony before the Senate Finance Subcommittee in July of 1981, small businesses, and especially minority-owned small businesses, have successfully avoided increased inner-city wage costs and have a better record than large corporations in working with residents of the central city who will form their primary work force.

Finally, I would like to address an issue that has been causing increasing concern within the industry. When the MESBIC program was created administratively in 1969, its intended purpose was to provide assistance to minority-owned firms. However, in 1972, Congress mandated that MESBICs would invest in businesses owned by socially or economically disadvantaged persons. The MESBIC program has come under fire for providing assistance to minority entrepreneurs some may consider of questionable eligibility.

The definition of "socially or economically disadvantaged" was established by Congress, and the SBA established investment guidelines within that definition. It only makes sense that MESBICs would seek out the most viable entrepreneurs within those classes. It is important to understand that the investment company industry looks to entrepreneurs and business opportunities that have the greatest chance for success. It is absolutely essential that MESBICs have the flexibility to invest in individuals who have the potential to make good business decisions and can operate in a business climate. Any other attitude would doom the program to failure and do a great disservice to the minority community.

Secondly, the fact that the concentration of the above-mentioned groups of people in the country is not uniform, but is concentrated in certain regions, creates a need for a more detailed study of the situation in these regions. This is especially true for the regions of the Far North, where the concentration of the above-mentioned groups of people is the highest. The study of the situation in these regions is of great importance for the development of the country's economy and for the improvement of the living conditions of the population.

We would like to thank you for this opportunity to present our priorities to your committee. The American Association of HESOLC stands ready at any time to furnish you with additional information.

American Electronics Association
Government Operations Office

AEA

1612 K Street NW
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February 3, 1983

1983 Legislative and Regulatory Agenda

INTERNATIONAL TRADE

Export Administration Act

The principal statute regulating exports for foreign policy and national security expires September 30, 1983. AEA is seeking to limit national security export controls to those technologies which are genuinely militarily significant, and assure realistic assessments of availability from foreign competitors.

Reciprocal Market Access

AEA seeks the same degree of access to foreign markets for competitive U.S. exports which we accord products from other countries.

Domestic Content Legislation

The House passed last year, and will consider again this year, a bill mandating a minimum percentage of domestically produced components in various manufactured products. Though the bill reduces the GATT rules to May 1985 this year.

GATT Coverage of Services and Investment

The General Agreement on Tariffs and Trade system of international rules presently covers only trade in products. The Reagan Administration and AEA strongly support expansion to cover the growing volume of trade in services and foreign investment.

Expanded Presidential Tariff Reduction Authority

Section 124 of the 1974 Trade Act which gave the President authority to negotiate tariff reductions expired in January of 1982. AEA is seeking its renewal.

Reorganization of Federal Trade Agencies

Several proposals have been offered to reorganize the trade functions of the Government into fewer agencies or a single department. AEA will only support changes it believes will effectively increase trade.

TAX DEFENSE

R&D Tax Credit

AEA will strenuously oppose proposals to exclude the business expense deduction on R&D for which the credit is claimed.

D.I.S.C.

AEA supports retention of the Domestic International Sales Corporation, believing it to be the most effective incentive to high technology exports that is likely to be found for the equivalent cost to the Treasury.

Foreign Tax Credit

The House Ways and Means Committee staff last year proposed converting this credit to a deduction.

Incentive Stock Options

Key staff level people both at Treasury and the Joint Committee on Taxation consider ISO's inequitable mechanisms for converting ordinary income into capital gains. They may spring new "midnight surprises" like last year's inclusion of ISO's in the alternative minimum tax.

SKILLED LABOR SHORTAGE

Tax Incentives for Donations to Engineering Education

AEA has initiated bills to expand the R&D tax credit to cover corporate donations to universities for engineering faculty positions, and expanding the research equipment donation deduction to cover scientific hardware donated for engineering education.

Immigration Reform

AEA is pursuing amendments to the pending immigration reform legislation to assure the continued availability of foreign nationals who graduate from U.S. colleges with EE or Computer Science degrees.

FEDERAL PROCUREMENT

DoD Computer Standardization

DoD has proposed an instruction (DoDI 5000.5X) which would require that all mission-critical computers procured by DoD be standardized on a few DoD developed instruction set architectures. This would freeze out virtually all commercial computers and impede the infusion of new technology into defense-critical systems.

Cost Approval of Independent R&D (IR&D)

New requirements that DoD's IR&D and Bid and Proposal expenditures be set by appropriation bills could threaten the independence of IR&D and limit B&P funds which are essential to competing for DoD business.

Recoupment of Government Paid R&D Costs

Present policy requires companies selling goods overseas which were developed with government R&D funds to repay a percentage of those funds. This increases the cost of U.S. goods competing in international markets. AEA supports changes to increase U.S. competitiveness.

Post-Contract Profit Controls

Legislation reinstating the Renegotiation Act has been reintroduced in the new Congress.

Service Contract Act

AEA is seeking amendments to clarify the Congressional intent that services for high technology products are not included under the Act.

ANTI-TRUST AUTHORITY FOR JOINT R&D

Uncertainties in the application of current anti-trust laws are a significant deterrent to undertaking collaborative R&D efforts. AEA will support legislative clarifications.

LOBBYING LIMITATIONS

The Office of Management and Budget has recently proposed a revision to its Circular A-122 and DoD has issued an identical Defense Acquisition Regulation disallowing all costs associated with "political advocacy". These regulations would disallow as a cost in government contracts any activity intended to influence government decision making (possibly excluding marketing) at any level of government. AEA is working with other industry groups to alter these regulations to permit continued free expression in the political process by businessmen.

Testimony of Jerry L. Arnold
Associate Professor, School of Accounting

UNIVERSITY OF SOUTHERN CALIFORNIA

Before the Senate Small Business Committee

February 25, 1983

The first phase of our study was designed to learn what the owners and managers of small businesses believe are their most critical management needs. (A copy of our report on Phase I of this study is attached.)

Quite frankly, we were surprised by some of the initial findings. Specifically, we expected to find that the respondents would be more concerned than they were with raising capital. Altogether, we received responses to questionnaires from 430 owners and managers of small businesses. These respondents placed financing alternatives next to the bottom in a list of 17 critical management needs. In the past, a great deal of attention has been focused on the financing problems of small businesses, and yet these results suggest that concern may well be exaggerated.

The second significant finding involves the high degree of importance which owners and managers of small businesses assigned to solving day-to-day problems.

The highest of these, viewed as very critical by 61 percent of small business managers, is cash management. The second highest ranking -- 55 percent -- went to internal control systems, and the third highest -- with 53 percent -- went to strategies for pricing. On the other hand, only 26 percent of small business owners and managers cited long-range planning as a major concern. It ranked ninth on a list of 17.

In today's economic environment, effective planning may mean the difference between survival and bankruptcy for many small businesses. In many cases the owners and managers of small businesses are caught up in the day-to-day demands of their business. Until they can free some time to plan for the future, much of their energy will continue to be devoted to addressing immediate crises at the expense of a well planned future.

While these results are important in and of themselves, they also serve as the foundation for the second and third phases of the study. The second phase is now in progress; we are distributing questionnaires to more than 4,000 owners and managers of private companies to learn how they view the professional services that are provided to their companies. From the second phase we hope to learn which professional groups are providing services to meet the specific needs of private companies and how satisfied the recipients are with these services. We also hope to learn how professional services are selected and what can be done to improve the level of service provided.

Specifically we will look at bankers, outside accountants, independent consulting firms, attorneys and secured lenders, as well as internal management. We expect to have a report on the second phase by summer.

Our third phase will concentrate on the providers of these services to ascertain their reactions to the findings of Phase II. We believe the information should be useful to all parties interested in helping to solve the problems faced by small and medium-sized businesses, and we hope the findings will lead to improved service

Already we have confirmed that small, emerging businesses are faced with extreme day-to-day pressures just to survive and that they appear to be limited in their capability to plan for the future. Obviously an area where outside groups can take a positive and active role is by providing strategic and long-range planning.

We appreciate the opportunity to come before you today and look forward to the opportunity to share the results of future phases with you.

Thank you.

STATEMENT OF T. W. BURGE
MACHINERY DEALERS NATIONAL ASSOCIATION
U.S. SENATE COMMITTEE ON SMALL BUSINESS
FEBRUARY 25, 1983

I am T. W. Burge, Vice President of Machinery Dealers National Association (MDNA) and President of The Machine Tool Exchange, Inc. which is located in Santa Fe Springs, California. I am submitting this statement on behalf of the 500 MDNA member firms. We are small businesses which account for over 70% of the used machine tools sold in the United States. Because used capital equipment is acquired from large manufacturers and usually resold to small manufacturers, MDNA members are in the unique position to articulate the economic problems of the small business community, which needs your help now. Our statement concentrates on two primary concerns of our members and which we believe are shared by all small businesses: removal of the arbitrary and discriminatory ceiling imposed on the investment tax credit available to purchasers of used equipment and machinery and the need for a national product liability law.

INVESTMENT TAX CREDIT FOR USED MACHINERY AND EQUIPMENT

Under present law, there is a \$125,000 limitation on the amounts of used equipment eligible for the investment tax credit, but there is no limitation on the investment tax credit available for new equipment. This ceiling will increase to \$150,000 in 1985. Similarly, the same carryback/carryforward provisions available for new equipment are not

allowed to purchasers of used equipment who may not carry-forward or carryback tax credits on investment over the limitation amount.

Since the original \$50,000 ceiling was established in 1962, the cost of basic, unsophisticated used equipment has generally increased by over 500%. It would cost over \$600,000 to start a small machine shop which would employ ten people. If a large company which could afford to buy new equipment purchased \$600,000 of equipment, it would receive an investment tax credit of \$60,000 (10% of \$600,000). If a small firm bought \$600,000 of used equipment, it would receive an investment tax credit of \$12,500 (10% of \$125,000). In addition, purchasers of new equipment can carryback three years and forward seven years that part of the investment tax credit on the \$600,000 purchase which cannot be used in the year of purchase. The small business which purchases used equipment can carryback and carryforward only the \$12,500 which is allowed as a result of the limitation. The \$475,000 in excess of the limit would receive no investment tax credit in any year. This example clearly illustrates the discriminatory impact on small business of this limitation.

Furthermore, an established manufacturer has hardly begun to retool before he realizes that the \$125,000 ceiling offers him very little assistance at all. The original arbitrary and inadequate limit of \$50,000 was merely a token gesture to small business and in light of

inflation, doubling the limit to \$100,000 thirteen years later and to \$125,000 nineteen years later has perpetuated the injustice.

This discriminatory tax treatment impacts directly and primarily upon small businesses which are already hindered by their inability to externally or internally generate the capital necessary to buy equipment. Capital stock formation among small business (which may be the nation's best source of economic growth) has been impeded by high interest rates, restricted availability of credit, the government's regulatory burdens, and tax laws which discriminate against small business. Since small business cannot generally afford or justify new machinery, it requires quick passage of tax incentives which will enable it to buy the used equipment it needs for start-ups or to boost productivity and expand the capacity of its current business.

The Joint Economic Committee and the White House Conference on Small Business both have recognized the disparity between large and small businesses as they are affected by inflation and current tax policy. Both have called for tax measures targeted to small business that will enable smaller firms to retain a greater proportion of their earnings for reinvestment in capital improvements and plant expansion.

The current disparity between the investment tax credit available to new and used equipment is in effect a Congressionally mandated discrimination against small business

which directly dilutes the ability of small business to compete with large firms and survive. This disparity also allows new foreign machinery a competitive edge through the investment tax credit advantage over equally efficient and price competitive used domestic machinery. We assume this was not the original intent of the \$50,000, \$100,000, and \$125,000 ceilings.

In the 97th Congress, both the Senate and the House Small Business Committee identified the tax credit for used equipment as one of the top priorities in their capital formation and tax recommendations. When introducing his proposal to raise the current arbitrary limitation (S. 360), Senate Small Business Committee Chairman, Lowell Weicker, stated that "the substantial small business dependence on used equipment, particularly in this high technology environment, suggests that as a matter of simple equity for our Nation's small businesses the existing ceiling on used investment should be increased, if not removed entirely." (Emphasis added) Senator Weicker's bill would have raised the ceiling from \$100,000 to \$250,000. He also urged the Finance Committee to phase in an elevation of the ceiling to reach \$500,000 by 1985. Senator Weicker concluded that "elementary justice" and the "improved productivity of our economy" required this basic change.

The importance of this issue is further evidenced by the fact that eight legislative proposals in the House and two in the Senate had been introduced in the 97th

Congress, including Senator Weicker's bill. Senator Bentsen introduced S. 1140 which was cosponsored by Senators Danforth, Baucus, Mitchell, and Chafee. That bill would have raised the limitation to \$250,000 and allow a carryback and carryforward of the cost of used equipment if it exceeds \$300,000 for any taxable year. Senator Bentsen stated that he believed "that an increase in the regular investment tax credit for used equipment is necessary to assure that the small businesses participate in the general upgrading of productive facilities which this proposal is intended to stimulate.... Finally, by allowing a carryover of any unused tax credit, we insure that businesses make the necessary investment this year without being deterred from making such investments due to the limitation on the amount of property qualifying for the investment tax credit." Senator Bentsen continues to be concerned about this issue and has indicated his intention to introduce a small business tax bill that will remove the limitation entirely.

In the House, Congressman Bill French and Congressman Kent Hance have introduced H.R. 1977 and H.R. 2759, respectively, both of which eliminate the limitation entirely. Congressman Tom Downey introduced H.R. 3644 which would have raised the limitation to \$200,000 and allowed a carryback/carryforward of the cost of used equipment in excess of that limitation for any taxable year. Congressman Jimmy Quillan, Dan Marriott, Marty Russo, and Cecil Heftel introduced bills which raise the limitation to \$500,000, \$300,000, and \$200,000, respectively,

We appreciate the efforts of these Senators and Congressmen in attempting to help on this issue. We are concerned that the mere raising of the limitation perpetuates the discrimination which is inherent in the current provisions of the tax code. The carryback three years and the carryforward seven years of the amount in excess of the limitation which was included in a number of these bills would have helped ameliorate this discrimination against small businesses.

In 1975 the Senate Finance Committee reported out and the Senate passed a tax bill which would have eliminated the limitation entirely. In 1981, the Senate Finance Committee reported out a tax bill which eliminated the limitation and required a recapture of the tax credit computed upon the resale value of the used equipment. On the Senate floor this provision was dropped from the bill and Senators Weicker and Durenberger succeeded in the passage of an amendment which raised the ceiling to \$125,000 in 1982 and \$150,000 in 1985.

Our proposal for small business relief from the discriminatory limitation on the investment tax credit for used equipment and machinery was supported in the 97th Congress by the Small Business Legislative Council (see Appendix A), the National Federation of Independent Businesses, the National Association of Wholesaler Distributors, the National Small Business Association, as well as many other small business trade associations. In a poll conducted by the House Small Business Committee, this issue ranked in the

top three of all small business tax priorities.

We commend the Senate Small Business Committee for its support of our proposal in the past and urge that it give priority to passage of tax legislation which will eliminate the limitation during the 97th Congress. The benefits to our economy which can be derived from removal of this provision are: more competitive small businesses, stimulation of capital investment, development of creative and innovative products and processes, starting new businesses, helping small business maintain its market share and survive, expansion of capacity and productivity, increased employment, improved balance of payments, increased demand for new domestic machine tools, reduction in inflation, generation of more tax revenues, and equal opportunity for growth of all businesses.

We believe that small business is crucial to the survival of a free enterprise system. Small business is an effective force even in heavily concentrated markets, but its position is fraught with difficulties. The tax laws should not further handicap small businesses by giving tax breaks to industrial giants and denying such incentives to small businesses. We urge that enactment of this proposal not only for the major assistance it will give small business in its capital formation efforts but also because of the symbolic importance of the Senate going on record against discriminatory tax treatment of small business.

PRODUCT LIABILITY

MDNA supports the passage of S. 44, "The Product Liability Act," which was introduced by Senator Robert Kasten on January 26, 1983 and which establishes a uniform Federal product liability law. That bill is cosponsored by Senators Garn, Glenn, Gorton, Hatch, Helms, Lugar, Nickles, Percy, Quayle, Stafford, Wilson, Huddleston, and Goldwater. We urge that the members of this Committee cosponsor S. 44 and that this Committee as a body support its passage. S. 44 is identical to S. 2631 which was approved by the Committee on Commerce, Science and Transportation on December 1, 1982.

The Product Liability Alliance (TPLA), a diverse coalition of over 230 organizations, including manufacturers, wholesaler-distributors, retailers, insurance companies, agents, and brokers, have been working actively in support of this legislation as well as the Special Committee for Workplace Product Liability Reform of which MDNA is a member. A listing of the TPLA Steering Committee is attached for your information as Appendix B. We are particularly concerned with the product liability problem in the workplace and will concentrate our testimony in that area.

We believe that the facts which have been developed by the Interagency Task Force on Product Liability, the Congressional hearings on product liability, and the studies and surveys conducted by other organizations (including our own members) clearly establish that the product liability problem in the workplace has reached proportions threatening

to the industries of America. We agree with Senator Kasten's statement that "product liability legislation is needed to bring uniformity and certainty to the law and to stabilize what has become a serious burden on interstate commerce."

We commend Senator Kasten and the Consumer Subcommittee for preparing a comprehensive and precise product liability law. The developmental process this legislation went through during the 97th Congress was comprehensive and balanced. The Consumer Subcommittee recorded and considered thousands of pages of testimony and comments from consumer groups and product sellers, as well as others affected by the product liability system. Legislation was only introduced after a lengthy consultative process which saw the development of four Staff Working Drafts over a period of many months. We believe that S. 44 will simplify, clarify, and bring uniformity to the present tort law of product liability. It should also help to overcome some of the injustices and inequities which have resulted from the extreme positions taken by the courts of some states. By specifying criteria for determining responsibility and limitations on responsibility, S. 44 should reduce uncertainty and ambiguity in the product liability field.

We believe that the product liability problem as it relates to workplace injuries is interwoven tightly with the inequities and injustices inherent in our current system for compensating victims of workplace injuries. Under

present law, almost all state workers' compensation statutes (and/or their court interpretation) bar recovery or indemnification from the employer by a workplace product manufacturer, no matter how negligent the employer may have been in failing properly to guard and maintain that product or in failing to instruct and monitor his employees on how to use it. This inequity is further compounded by the fact that, in many jurisdictions, the employer and/or his workers' compensation insurance carrier obtains a subrogation lien from third party recoveries even though the employer may have caused or contributed to the cause of the employee's injury. The Insurance Services Office (I.S.O.) study reveals that about 56% of workplace product liability bodily injury payments involve cases where the employer may have been negligent. Thus, manufacturers of workplace products are, in effect, paying the entire cost of many industrial accidents, while employer users of the products are completely relieved of financial responsibility despite the fact that they may have been in a better position (or in the only position) to prevent the accident from occurring. For example, it is the employer who has control over the equipment, its maintenance, and its use, and it is the employer who makes decisions determining whether potential injuries outweigh the cost of preventive measures. Insulating employers and employees from the effects of their

own negligence results in a disincentive for workplace safety. The present system is extremely unfair and wasteful, and the wrong party is paying the bill for this wasteful system.

In a 1976 survey of the National Machine Tool Builders Association, it was found that in only 13% of the workplace product related accidents could a case be made that the accident resulted from some sort of mechanical failure of the machine itself. Many of the machines have been modified one or more times by the employer and/or the person or persons from whom he bought the machine. The study shows that 18% of these machines were poorly maintained by the employer. Sixty-three percent of the time the accident occurred because the employer failed to properly guard the machine. Thirteen percent of the accidents occurred because he failed to make sure that his employees used the appropriate safety device. Sixty-five percent of the injured employees did not receive appropriate training from their employers on how properly and safely to operate the machine. The survey also showed that 56% of the injured employees had been on the job for less than six months prior to the accident. These statistics reveal the variety of causes of workplace injuries, which are beyond the product manufacturer's control and yet, because of the failure to integrate the legal principles

and social basis of strict liability and workers' compensation, the manufacturers of workplace products are paying for these injuries while the employee and employer are relieved of any responsibility. The House Subcommittee on Capital, Investment, and Business Opportunities concluded that: "It is inequitable for manufacturers to shoulder the entire burden for workplace injuries when the employer's negligence contributed to the same." H.R. Rep. No. 997, 95th Congress., 2d Sess. 74 (1978).

The high costs involved in having key personnel assist in the defense of a case must also be considered. We cannot understate the cost to industry of executive and engineering time spent in responding to voluminous discovery requests and in defending product liability suits.

The cost of resolving product liability disputes cannot be overlooked. These high transaction costs are caused largely by the lengthy litigation involving applicable rules of liability, rules that are subject to a great deal of uncertainty. The American Insurance Association has cited estimates that for every 66 cents an injured claimant receives, 77 cents is spent in legal costs. The quantity of product liability lawsuits has led many product liability insurers in the late 1970's to either leave the field or to charge high premiums unrelated to the insured's individual

claims experience. These high transaction costs cannot be justified as part of any meaningful compensation system.

Unfortunately, in dealing with this crisis, the manufacturers may not in fact even have the option of selling out and ceasing to operate in the field rather than risking bankruptcy, since unfunded contingent liability on claims not yet filed makes it difficult if not impossible to sell small companies in the machinery manufacturing and distribution field, even through a sale of assets. In James Allen Trimper v. Bruno-Sherman Corp., 437 F. Supp. 349 (E.D. Mich. 1977), for example, the court found that liability can attach to a successor to certain assets of the original third party manufacturer of a machine which was involved in an injury, even though there had been two intervening sales of assets of the original company. Fear of being "infected" with potential future claims through any interrelationship, no matter how attenuated, leaves the manufacturer who cannot afford insurance unable even to sell his company or its assets.

The harmful effect of these economic realities upon the capital equipment industry in the United States is hard to estimate exactly; but it clearly has had a major

impact on increased prices with an attendant ripple effect on sales, inflation, and ability to compete with foreign sources. The costs are ultimately passed on to U.S. consumers in the form of higher prices for products. Some companies discontinue manufacturing those items that account for most product liability suits and thereby remove highly vulnerable, but possibly vital, industrial products. The Interagency Task Force on Product Liability in its 1978 study also found that some firms are already reluctant to develop and introduce new products because of product liability risk. This trend could exacerbate the already serious problem of the United States losing its competitive edge in technology.

Product sellers, insurers, and risk retention groups need a uniform, unambiguous, and fair product liability law so that they will have a firm basis upon which to project their responsibility and liability exposure. Currently, the "rules vary from jurisdiction to jurisdiction and are subject to rapid and substantial change. These facts militate against predictability of litigation outcome." 44 Fed. Reg. 62716 (1979). The proposed "Product Liability Act of 1982" addresses this problem where it must be dealt with: at the Federal level. At the same time, however, it calls for no expenditures of Federal revenues, no new Federal bureaucracy, and no expansion of the Federal courts.

There is no single system or common body of laws which exist in the United States concerning product liability. Each state has its own common law on product liability. In

recent years this common law has been subject to frequent and substantial revision. Because of the rapid change in product liability law in each state, and because the common law rules on product liability vary from state to state, it is virtually impossible for a manufacturer of products sold throughout this country to determine the current status of "the law" when it is attempting to determine its legal duties. Insurance companies claim that they cannot predict their exposure and that, to avoid disaster, they are forced to assume the worst and charge accordingly. Manufacturers are outraged at increases in deductibles and high premiums which do not reflect actual product risks or liability losses.

There are those who say that current efforts to achieve product liability reform at the state level will resolve this problem. However, that solution ignores the fact that product liability insurance rates are not set on a state-by-state basis, but rather are established on the basis of a nationwide experience. Since the sale of products is not limited to the state in which they are manufactured, and tort law varies from state to state, it is not surprising that the insurance companies set their rates on their nationwide loss projections. Furthermore, there is no indication that tort reform laws that are passed on a state-by-state basis will be sufficiently similar ever to form the basis for the predictability and certainty which are a prerequisite to lowering of insurance rates.

We also recognize that the thousands of small businesses represented by our organization cannot afford the legal and engineering time and cost which would be necessary to analyze the responsibility of a manufacturer under the product liability laws of all 50 states. This has had a chilling effect on product development and innovation. Furthermore, the uncertainty in the law requires extensive and costly litigation in the pursuit of further definition and determination of what legal principles are applicable in a given case. A court must not only decide which state's law will govern the case but it must also then delve into the morass of conflicting decisions concerning the subject. Of course, this is exacerbated by the increasing volume of product liability litigation. Indeed, the number of product liability cases filed in Federal courts around the country has "more than doubled in the last three years." Business Insurance, October 12, 1981.

It is important to note that the tort reform laws which have been passed at the state level are not consistent but differ in substantial degree. In fact, recently enacted state product liability laws have created new variances in our nation's tort laws, resulting in more confusion and uncertainty. Over thirty states have enacted some form of product liability statute in the past six years. Of the states which have passed such legislation, some have passed a statute of repose, cutting off liability on products after a given life span, and others have not. Some of these provide for an absolute cutoff of liability after a number

of years (varying from 6 to 12), and others provide for a presumption of no responsibility after a given number of years or something less. While some provide that modification or misuse of a product is a defense, others do not. Some of these statutes are very limited in scope; others are more comprehensive. The language used for similar provisions differs, thereby opening the door for varying judicial interpretation. While we applaud the efforts to achieve tort reform at the state level, we have no confidence that the same bill will be passed in each state with the same provisions or the same language. The current experience with state tort legislation suggests variations will occur even in passage of a model product liability act, followed by further variation in judicial interpretation. Finally, we believe the inequity and imbalance in the current product liability system must be corrected with a minimum of delay. The adverse impact on medium and small business and ultimately upon consumers and the economy in general cannot be allowed to continue much longer. It took 15 years to pass the Uniform Commercial Code at the state level, and it still has variations from state to state. The nation cannot afford to wait 15 years for widespread passage of a model product liability act.

It is argued that we should not have tort reform at the Federal level because tort law has historically been the province of the states. We believe recent legislative history indicates that this is not true. There are a number

of Federal statutes which were enacted to provide benefits or settle claims where state law was deemed inadequate to compensate for workplace injuries. Perhaps the first Federal legislative effort in this area was the "Federal Employees' Liability Act" which was passed in 1908 in order to apply a Federal tort law to determine the damages incurred by any railroad employee injured or killed in the course of employment. This was followed in 1927 by passage of the "Longshoremen's and Harbor Workers' Compensation Act" which provided workers' compensation as well as a Federal tort law to deal with claims against ship owners. More recently, laws have been enacted which, for example, provide compensation benefits for non-Federal law enforcement officers (5 U.S.C. §§ 8191-8193) and compensation for black lung victims (30 U.S.C. §§ 901-936). Importantly, the tort law called for here, unlike the Longshore and Black Lung schemes, requires no Federal bureaucracy and no expenditure of Federal monies.

Since the late 1960's, there has been an increasing involvement of the Federal government in tort law related issues: "The Crime Control and Safe Streets Act" 18 U.S.C. § 2520 (1968) (civil action against any person who intercepts a telephone conversation); "Consumer Product Safety Act" 15 U.S.C. § 2072 (1972) (Federal tort remedy for persons who are injured as a result of a knowing violation of a safety standard or rule of the CPSC); "Price-Anderson Act" 42 U.S.C. § 2012 (1975) (no-fault compensation system for catastrophic accidents at nuclear power plants); "National

Swine Flu Immunization Program" 42 U.S.C. § 247(b) (1977) (Federal responsibility for strict liability tort claims that arose out of that program). In addition, Federal regulation of airline transportation has changed the law of trespass and nuisance as it regards aircraft. Moreover, the comprehensive "Environmental Response, Compensation and Liability Act of 1980," which deals with the damages that arise from hazardous substances, impacts on traditional state tort law by establishing Federal strict standards of liability, joint and several liability, as well as apportionment of damages. Clearly, there is ample precedent for Federal legislative activity in tort law. The tradition of state control over tort law has long given way where there is a need for national solutions to national problems. The proposed legislation addresses what is certainly one of the most appropriate and sorely needed areas of Federal attention.

Because of the severely detrimental impact on interstate commerce of the current chaos among states regarding product liability, we believe that product liability reform should be enacted at the Federal level and not on a state-by-state basis. Since product liability insurance rates are set on the basis of a nationwide experience rather than individual state experience, variations on a state-by-state basis will impact adversely on the goal of achieving affordable and stable product liability insurance rates. Through a clear understanding of their product responsibilities as set forth in the Federal bill, manufacturers will no longer be reluctant to develop new and innovative products which will

be distributed throughout the country. Litigation costs will be substantially reduced through elimination of the costly process of determining conflicts of law issues and defining which principles of law are applicable. We believe that the only way to alleviate these problems is to enact this tort reform legislation on a nationwide basis, thereby insuring uniformity and stability in the law of product liability and hastening the implementation of this much needed reform.

Understanding that the product liability problem in the workplace is a serious impediment to interstate commerce requiring Federal legislation, we believe that the S. 44 is an appropriate response to that problem. The interaction of Section 9, Comparative Responsibility, Section 10, Misuse or Alteration, and Section 11, Effect of Worker Compensation Benefits, should bring balance to the workplace product liability compensation system. The responsibility of the careless employee and careless employer will be weighted in apportioning responsibility between the persons involved.

We urge the Senate Small Business Committee to include in its priorities the passage of S. 44 and the elimination of the limitation on the investment tax credit available to purchasers of used machinery and equipment.

APPENDIX A

INVESTMENT TAX CREDIT

The decline in our productivity is caused by several conditions. For the first time in twenty years, the Joint Economic Committee Annual Report of 1979 unanimously concluded that an increase in productivity is vital to the improvement of our economic standard of living and to the reduction of inflation. A partial cause of this situation is the antiquated production facilities of many American manufacturers. Another partial cause is the utilization of inefficient equipment; and yet another partial cause is the overall age of our country's industrial machinery. The most recent U.S. survey of machine tools shows only 11% of the industrial machinery in use today is less than five years old; 76% is at least ten years old. Equipment renewal and upgrading are necessary in both large and small manufacturing companies. Increasing productivity through equipment renewal is best achieved for small business through the purchase of affordable used machinery and equipment.

Under present law there is a \$100,000 limitation on the amount of used equipment eligible for investment tax credit, but there is no limitation on the investment credit available for new equipment. This discriminatory tax treatment impacts directly and primarily on small business which is already hindered by its inability to externally or internally generate capital necessary to buy new equipment.

In order to increase productivity and competition, the discriminatory ceiling on the amount of used property eligible for a tax credit must be eliminated; and, the carryover provisions available for new property must also be available for similarly situated used property. Traditionally, small businesses purchase used capital equipment; large businesses basically purchase newly manufactured capital equipment. The cost of obtaining capital for production equipment is high for everyone, especially those who cannot borrow at the prime rate. Firms purchasing used capital equipment do not have a chance to offset some of their costs through this tax credit. Confining the investment credit to only equipment with the latest technology helps primarily the largest enterprises and basically ignores the numerically greater small business segment of our economy which needs this tax credit the most. Because the small business sector offers the greatest potential for increasing employment, there is normally a direct relationship between increased installation of used machinery and increased employment.

RESOLVED

Small Business Legislative Council urges and supports changes in the IRS Code to allow a full investment tax credit for used machinery and equipment. This full investment tax credit will allow small businesses to receive the same tax incentive provided to big businesses and would allow small businesses to compete, to maintain their current market share, and to hopefully expand output and productivity.

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Small Business Legislative Council*

July 30, 1980

The position paper -- Investment Tax Credit -- is supported,
as of this date, by 51 members of the Small Business Legislative
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- | | |
|---|--|
| American Assn. of MESBICs
Washington, DC | Direct Selling Association
Washington, D.C. |
| American Assn. of Nurserymen
Washington, DC | Eastern Manufs. & Importers Exhibit
New York, NY |
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Washington, DC
- Natl. Tooling and Machining Assn.
Washington, DC
- Natl. Tour Brokers Assn.
Lexington, KY
- Power & Comm. Contractors Assn.
Washington, DC
- Printing Industries of America
Arlington, VA
- Sheet Metal & Air Cond. Contrs.
Natl. Assn., Vienna, VA

APPENDIX E

THE PRODUCT LIABILITY ALLIANCE

1725 K Street, N.W. Suite 710
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THE PRODUCT LIABILITY ALLIANCESTEERING COMMITTEE ORGANIZATIONS

Aetna Life & Casualty	Motor Vehicle Manufacturers Association
A H Robins	National Association of Casualty & Surety
Alliance of American Insurers	National Association of Furniture Manufacturers
American Business Conference	National Association of Manufacturers
American Insurance Association	National Association of Wholesaler-Distributors
American Mining Congress	National Electrical Manufacturers Association
Armco, Inc.	National Machine Tool Builders Association
Associated Equipment Distributors	National Product Liability Council
The Black & Decker Manufacturing Company	National Rifle Association of America
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Crum & Forster Insurance Companies	Special Committee for Workplace Product Liability Reform
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E I Dupont de Nemours Company	Textron, Inc.
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General Electric Company	U. S. Industrial Council
Gulf & Western Industries, Inc.	3M Company
Hartford Insurance Group	
Household International	
Independent Insurance Agents of America	
Material Handling Institute	
Merck & Company, Inc.	

UNFAIR UNFAIR UNFAIR UNFAIR UNFAIR COMPETITION:

How Government
Gives the Edge to Nonprofits
in the
Communications Business

UNFAIR COMPETITION: How Government Gives the Edge to Nonprofits in the Communications Business

by Susan J. Duncan
for the National Audio-Visual Association

ACKNOWLEDGEMENTS

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I. Why NAVA Opposes Unfair Competition in the Communications Business

The National Audio-Visual Association (NAVA) is the international trade organization of the audio/visual/video/microcomputer industries. NAVA members are business and media professionals concerned with developing and promoting more advanced and effective ways to educate, communicate, and train.

In recent years, NAVA has participated in federal investigations of unfair government competition with business, particularly with small business.

For example, Bennett Schultz (DCA Educational Products, Warrington, Pennsylvania), representing NAVA, testified at the 1979 Small Business Administration (SBA) hearings on this subject.¹ Schultz outlined several instances of unfair competition in the A-V industry, and other witnesses documented unfair competition in other industries.

These hearings laid the groundwork for SBA's publication the following year of *Government Competition: A Threat to Small Business*,² which, as the title implies, focused on competition from government agencies and their nonprofit grantees and contractors.

In 1981, NAVA was represented at a Joint Economic Committee hearing in which David Stockman, director of the Office of Management and Budget, testified that the Reagan Administration "would welcome a clear statement of intent by the Congress in support of the policy that the government should not compete with the private sector."³

In 1982, NAVA presented a statement at a hearing held by a U.S. Senate Committee on Governmental Affairs subcommittee to examine legislation redressing unfair competition.⁴ (This legislation is discussed in Section IV of this report.)

Government Studies Recommend Action

Other government studies have also identified unfair competition as a small-business nemesis. For instance, in 1979, the small-business committee of the domestic policy review of industrial innovation (conducted under the auspices of the Department of Commerce) made these recommendations:⁵

- There should be decreased emphasis on applied research in universities, federal laboratories, and nonprofit institutions, particularly where such applied work might preempt private initiative or is duplicatory or competitive with private sector activities.

- A clear federal policy should be established and enforced to prohibit federal funds from being used to finance projects that are competitive with or duplicatory of private sector technological developments, or, in any other ways, might prevent the establishment by small businesses of exclusive technological or intellectual properties in new areas of non-defense technological advancement.

Also that year, another SBA study, *Small Business & Innovation*, included this provision in its proposed "Small Business Innovation Act":⁶

Section 9: Government Competition with and Duplication of Small Business Entrepreneurial Activity: Federal Agencies should be prohibited from engaging in and supporting research and development projects that are competitive with or duplicatory of private sector technological developments, or in other ways might prevent the establishment by small business of exclusive technological or intellectual properties in a new area of non-defense technological advancement.

Unfair competition, both from government agencies and from nonprofit organizations, was again addressed by the 1980 White House Conference on Small Business:⁷

Recommendation 12: Existing Federal research and development procurement, assistance, and tax laws and policies must be modified and new laws enacted to: (1) eliminate unfair advantages enjoyed by governmental agencies, nonprofit organizations, and educational institutions which compete with innovative small business in providing goods and services; (2) mandate statutorily a national policy of reliance on small business; (3) prevent the Federal government from disseminating proprietary information; and (4) prevent the Federal government, through the use of its own personnel, including Federal Research Centers, from competing with small business.

Finally, a U.S. Senate Committee on Small Business subcommittee held its own hearings in 1981.⁸ Here, Edward Meell (Media Management Services, Inc., Yard-

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ley, Pennsylvania) testified on the effects of government competition in the A-V industry. The subcommittee also heard testimony from representatives of a variety of other industries.

Yet despite repeated censure, unfair competition continues to flourish. Complaints from NAVA members increase in frequency and vehemence each year. Moreover, the substance of these complaints has become increasingly serious: In addition to encroaching on small-business sales nationwide, unfair competition on a localized level eliminates products and services from small-business offerings, and in some cases, eliminates opportunities for small business.

Deficiencies of Previous Research

Previous studies of the subject, mentioned above, are incomplete in two respects. First, it is difficult to gauge the impact of unfair competition within the communications business because these previous studies have attempted to assess unfair competition across all industries. Without the information in this NAVA report, unfair competition could be interpreted as isolated incidents which occur in every industry—an annoyance but little more.

Second, these previous studies are largely restricted to only one form of unfair competition. Most of what has been written until now deals with competition from government agencies and from their nonprofit grantees. This report fills the gap by focusing on competition from nonprofit organizations, including educational institutions.*

This report is limited to one industry—communications—and describes the nature (Section II), impact (Section III), and extent (Section V) of unfair competition in this industry alone. Further, this report emphasizes competition from nonprofit organizations.

These organizations may or may not be financed through state or federal grants or contracts. But such financing was not a prerequisite for inclusion in this study. Since direct competition from federal agencies them-

selves has been a major topic of prior research, there are no examples of that in this report. There are, however, a few examples of competition from state agencies included for illustrative purposes.

How NAVA Performed This Study

In order to develop an accurate and comprehensive picture of unfair competition in the communications industry, research for this report entailed (a) an examination of NAVA files; (b) a review of the literature, including selected directories; (c) telephone and in-person interviews with NAVA members and others in the industry; and (d) consideration of sales catalogs and direct mail materials from the nonprofit competitors.

The list of nonprofits to be included as examples in Section V of this report was prepared only after all available information had been extensively researched and verified. For instance, a NAVA member inquiry about unfair competition from the National Geographic Society was investigated by examining the Society's sales catalogs, its advertisements in trade journals, its presence at trade exhibits, its listings in directories, reviews of its products, and testimony about the Society by nonmember industry executives.

In this manner, Section V attempts to identify some of the best-known and the most active of nonprofit competitors in the communications business. Other examples are in NAVA files, but were not used, due to the time constraints on the project. Many more examples would undoubtedly be revealed through additional research.

It is NAVA's hope that this report will renew legislative interest in solving the problem of unfair competition. NAVA also hopes the report will encourage other industry groups to undertake similar research.

Finally, we hope this report will provoke the kind of public reactions needed to discourage nonprofit competition. For an example of what can happen when public attention is focused on this problem, see "A Success Story" in Section III.

"... the Reagan Administration 'would welcome a clear statement of intent by the Congress in support of the policy that the government should not compete with the private sector.'"

David Stockman, Director of OMB, during a Joint Economic Committee hearing

*Note: SBA's Advocacy Task Group in Government Competition: *A Threat to Small Business* classified nonprofit grantees and contractors as indirect competitors. NAVA views unfair competitors as either the recipients of direct government funding (government agencies, grantees, contractors) or the recipients of indirect government subsidies (nonprofit organizations), through, for example, favorable tax laws, postal rates, and other regulations.

II. How Nonprofits Compete Unfairly

What is unfair competition? When a government agency, its nonprofit grantee or contractor, or a nonprofit organization enters into the commercial marketplace by producing, distributing, renting, or selling, that organization is competing with an unfair advantage.

Most people will agree that it is simply not a proper role for government agencies, funded by tax-paying citizens, to compete against those citizens in the provision of commercial goods and services. In effect, the citizen is subsidizing the competition. Moreover, government agencies were established to provide only "public" goods and services—those which cannot or will not be provided by the private sector.

But when the discussion turns to unfair competition from nonprofit organizations, there is some confusion and misunderstanding. Maybe it is okay if they do some business, a few well-meaning people argue. After all, in the current economic and political climate, the nonprofits themselves are watching their government funding sources dry up. By going into business, they expect to recover some of the lost funding.

Indeed, last year, the Montclair, New Jersey, school system announced that it would completely offset federal funding cuts of \$600,000 by relying almost entirely on sales from commercial services, such as data processing, book publishing (including A-V materials), and school supplies.⁸

Legislators and regulators who support public funding of nonprofits sometimes encourage such activities. They argue that the commercialization of products and services by nonprofits may gain a bigger bang for the government's dwindling bucks. Former Federal Communications Commission Chairman Charles Ferris said, "[I] have consistently urged public broadcasters [nonprofit public or educational stations] to develop new means of using the investment the federal government has made in their facilities in innovative and entrepreneurial ways in order to generate additional income sources."¹⁰

The consumers who, for instance, rent films from the local university rather than the local small business are likely to see only the dollars saved.

Few legislators, regulators, or taxpayers stop to consider the impact of nonprofit commercial ventures on small business. NAVA believes it is time to stop sending mixed signals; nonprofits should stay out of commercial activities.

What is Unfair about Nonprofit Competition?

At some point, the nonprofit organization, the politician, and the consumer all ask, "What is 'unfair' about nonprofit competition?"

By definition, a nonprofit organization is a vehicle for pursuing goals (e.g., charitable, educational, religious, civic service) that are not primarily for profit.¹¹ To avoid taxation a nonprofit organization may show a profit and still retain its nonprofit status; but only if that profit is incidental to the organization's operations.¹²

In exchange for foregoing monetary gain, a nonprofit organization in this country enjoys significant special privileges compared to for-profit enterprises. Consequently, whenever a nonprofit decides to enter the commercial marketplace, these special privileges automatically tip the scales in favor of the nonprofit.

Special privileges accorded by the government give nonprofit competitors an unfair advantage.

Unfairness to Industry: Lower Prices

Probably the most familiar special privilege accorded nonprofit organizations is tax exemption. Nonprofits are exempt from federal income taxes and can usually obtain exemption from state income, sales, and use taxes, and from local property taxes.¹³ Thus, when nonprofits enter the communications business, they can generally afford to price their products and services lower than can their tax-paying counterparts.

Nonprofits are fully aware of this price advantage and often exploit it in their advertisements and sales literature (see Section V in this report for examples).

A second special privilege is the availability of low, nonprofit postal rates,¹⁴ which reduce the costs of direct mail marketing. Lower postal rates give nonprofits the edge in promoting and shipping their products at costs lower than companies can.

Finally, many federal and state grants and contracts are designated for nonprofit groups only.¹⁵ When a nonprofit-produced product has been state- or federally funded, it is marketable at a substantially lower price than a privately financed product. Whereas for-profit companies must recover research, development, and sales costs, nonprofits enjoying government subsidies are under no such restraints.

Although nonprofit product prices vary (depending on the product, the organization, its pricing policies, and its distribution programs), there is widespread agreement, in both the private and nonprofit sectors, that nonprofit product prices are nearly always lower.

For example, two of the editors of a directory of training and development programs, Jill Provan, media librarian at a Veteran's Administration library, and Maryruth Phelps Glogowski, reference librarian at the State University of New York College at Buffalo, write: "... many public libraries loan films at little or no charge. College

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and university film rental libraries rent 16mm film (and occasionally video tapes) at costs lower than commercial distributors."¹⁶

A New York producer/distributor of agricultural and vocational education materials comments, "I'd say their [nonprofit] prices average 50% lower than ours. They trumpet their low prices."

A Tennessee dealer, who is also a NAVA member, notes, "The state education department distributes its materials free of charge—you can't get much cheaper than that. Our [competing] product is no longer viable. What school is going to turn away a free product?"

With respect to the price of state- or federally funded products, Education Development Center, Inc., a nonprofit Massachusetts corporation, advertises, "Because EDC is funded by the WEEA program within the [federal] Office of Education, these materials are sold at cost and are very reasonably priced."¹⁷

"Few legislators, regulators, or taxpayers stop to consider the impact of nonprofit commercial ventures on small business. NAVA believes it is time to stop sending mixed signals; nonprofits should stay out of commercial activities."

Susan Moulton of Source Communications, a video production company in Grand Rapids, Michigan, offers a concrete illustration of the pricing benefits conferred by nonprofit status. In anticipation of government funding cuts, WGVC-TV, a public television station licensed to Michigan's Grand Valley State College, recently began soliciting video production business by sending direct mail letters and rate cards. Source Communications was even one of those WGVC-TV solicited.

All of the equipment owned by WGVC and offered for commercial use in its rate card, including a mobile unit, minicams, and studio facilities, was obtained either in whole or in part with state or federal grants.¹⁸ Indeed, in 1981, the station manager boasted to *West Michigan* magazine that WGVC had become one of the best-equipped studios in the region for television and field production.¹⁹ This equipment, notes Moulton, "was purchased for non-commercial purposes—to train students and to provide local programs." In addition, 36% of WGVC's annual operating budget is tax-supported (unaided about equally between state and federal funding),²⁰ "putting us in a position," says Moulton, "of underwriting a competitor."

Thanks to these tax dollars, coupled with its tax-exempt status, WGVC can charge only one-third to one-half the rates commercial companies charge for the same service. According to Moulton:

For example, WGVC charges \$100 per hour for a 1" ENG/EFP shooting. This service is offered by five commercial companies in Grand Rapids, including my own. These five companies charge from \$175-\$250 per hour for a 1" ENG/EFP shooting. None of us could cover our costs, let alone generate a profit at the rate of \$100 per hour.

Like other A-V business owners, Moulton emphasizes her support for public television and believes that quality educational programming is "a valuable service to our

community." Because of the unfair advantages nonprofits bring to the commercial marketplace, however, she concludes that "it is unethical for WGVC to enter into competition with private business."

One of the most enlightening explanations of nonprofit product pricing is drawn from an article written by Betty Decker, marketing director of the Instructional Media Center at Michigan State University (MSU). Entitled "Marketing Your Own Instructional Materials,"²¹ the article is a "how-to" for other educational institutions looking to set up shop.

In it, Decker outlines pricing policies for MSU's audio/visual/video materials:

We have tried to set prices so that at least 25% of the sale price goes to the authors as royalties. [Beyond royalties, MSU faculty receive no compensation for being authors. The market-

ing division, however, takes 20% of the sales price for its services, after which the university receives the remaining funds.] Before we calculate royalties, our other expenses must be recovered. If a particular program requires the duplication of print materials, special packaging, preview stock, advertising, or other types of promotion, the marketing division advances those monies with the expectation of recovering the advances from future sales.

This pricing procedure closely resembles that of any commercial enterprise—except that Michigan State University is a nonprofit, state-supported, tax-exempt institution. Michigan residents, including Susan Moulton and other owners of Michigan's communications businesses marketing similar materials, are financing MSU's A-V operation. How many Michigan residents would approve of their tax dollars being channeled into commercial A-V operations?

Decker claims that the marketing division is now self-sustaining, that university monies were necessary only for the initial start-up. But if the division is operating in all respects like a profit-making business, with revenues from sales reinvested to finance continued operation, should it not be treated in all respects as a profit-making business?

Recall from the definition of nonprofit organization, above, that profits must be *incidental* to tax-exempt functions. Here, profits are freely acknowledged as *essential* to operations. A question for the IRS: Is MSU paying income taxes on its A-V sales revenues? And for the state of Michigan: Is MSU paying state income and state sales taxes on its A-V revenues?

Unfairness to Consumers: Inferior Quality

Even at lower prices, the consumer of the nonprofit product may often get less value per dollar spent compared to the for-profit product. One reason is the nonprofits' reliance on people who are not qualified for jobs

in the communications business. At educational institutions, for instance, teachers or professors may donate text- or script-writing time even though they have no training in scripting; a school official with no credentials in broadcasting may be selected to record or narrate the material; and students with no previous experience may be recruited for acting, artwork, filming, and other production services.

Such practices at Mt. San Jacinto College in California, a district-supported institution which produces and distributes vocational education materials, prompted a New York producer/distributor to observe, "They turn out very amateur productions."

An Oklahoma producer/distributor of primary and secondary educational materials, and a NAVA member, comments, "The materials coming out of the Dallas County schools are just not what I'd call finished products—they're not good quality."

And a Missouri producer of primary and secondary educational materials, also a NAVA member, believes that "only about 5-10% of the MECC [Minnesota Educational Computing Consortium] product line is worthwhile—the rest is [of] inferior quality."

The development of high-quality instructional materials requires not only educational, but also publishing/production experience. Nonprofit educational experience alone is not enough.

"The development of high-quality instructional materials requires not only educational, but also publishing/production experience."

Apple SWAP, a national nonprofit clearinghouse for educational software designed for the Apple microcomputer, notes that of the more than 8,000 programs submitted in 1980-81 by educators from half the states and seven foreign countries, only 15% were accepted into its library for public access.²²

Similarly, Dr. Gerald Gleason, professor of educational psychology at the University of Wisconsin, Milwaukee (an institution which is active in the production and distribution of vocational education materials—see Section V), writes in a critique of microcomputers in education:

[A] major source of programs [is] educators. The teachers probably have not had any formal training or experience in programming techniques, and this is likely to be reflected in their products. Again, some of these programs may be useful and effective, but most will not meet the quality standards we should expect. Preparing a good CAI [computer-assisted instruction] program . . . is an extremely time-consuming and expensive process, well beyond the capability and resources of individuals and even small groups of teachers. One only has to examine some of the programs offered for sale to realize that there is far more to CAI programming than learning to operate a microcomputer.²³

Educational experience alone is not enough, and neither is nonprofit publishing experience sufficient. In a product review of "Our Political System,"²⁴ a National Geographic Society filmstrip/cassette package for grades 5-12, Dwain Thomas, supervisor of the Instructional Services Department at Lake Park High School, Roselle, Illinois, writes, "The National Geographic Society typically is synonymous with quality photography. This new kit on our political system does contain striking visuals, but it lacks much in terms of instructional objectives and content substance. . . . Not recommended for purchase."

As Dr. Gleason points out, only the combination of educational and publishing experience can produce high-quality instructional materials. This combination can be found in the commercial marketplace:

Major publishers of educational instructional materials are beginning to invest substantial effort in the development of CAI programs for microcomputers . . . While some may reject this marketplace mentality, I believe that major publishers do have resources, organization, and experience which should result in high-quality programs.²⁵

Nonprofits' Unfair Image

If a nonprofit product is of lower quality, why then is it purchased? Answer: When the consumer is an educator, there is often a natural bias toward the product of an educational institution. But even when the consumer is not an educator, there is a bias toward nonprofit organizations in general. Along with their special legal privileges, discussed above, nonprofits in this country have acquired a "pro bono publico" image which carries over into their products, whether well-deserved or not. ("Pro bono publico" is a legal phrase meaning "for the good of the public.")

Attorney Marc Lane, author of the *Legal Handbook for Nonprofit Organizations*, contends that "even if we put aside possible tax advantages, the nonprofit entity has an unfair advantage owing to the public image of nonprofit status."²⁶ And like the lower prices made possible by tax exemption, nonprofits often exploit this image in their advertisements and sales catalogs (see Section V for examples).

"... the nonprofit entity has an unfair advantage owing to the public image of nonprofits."

Bennett Schultz (DCA Educational Products, Warrington, Pennsylvania) addressed this issue in his testimony before the Small Business Administration: "Tax-supported institutions are provided with federal funds to create curriculum materials. Because of the university imprimatur, the material is automatically assumed to be valid. . . . A goodly portion of this material could not survive the rigors of a 'free' market. Commercial producers would be afraid to put their names on much of what is offered by the universities."²⁷

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The Tennessee dealer, quoted earlier, whose product was displaced by a state department of education program, argues that "the state's program was developed in 90 days. It's nowhere near the quality of our program, but most schools automatically assume that any state-funded product will be high quality."

Price Makes a Big Difference

The consumer who recognizes inferior quality may nevertheless purchase the nonprofit product because the price difference is disproportionately larger than the difference in quality. Or, in the words of one NAVA member, an Illinois distributor of educational films, "If you had to pay \$800 to buy a high-quality film from us, and could get a similar film from a university for only \$100, even if it was mediocre, which would you buy?" A nonprofit product which, from a technical/educational perspective, is say, half as good as the commercial product can cost only one-eighth as much because of such nonprofit special privileges as tax exemption.

Few Pre-Purchase Previews From Nonprofits

To compound the consumer's problems in evaluating quality, many nonprofits lack the resources to offer pre-purchase previews of A-V materials, a common industry practice. For instance, at Cornell University, a private nonprofit New York school, there are only two order options, purchase or rental. But it may require a careful reading of Cornell's sales catalog to understand that simple fact:

Preview for Purchase. Preview prints are available on the same basis as rental films listed in this catalog. If the previewed film is purchased within sixty (60) days of the preview date, any paid rental fee will be deducted from the film purchase price. Return of preview films is the user's responsibility. Please ship via Special Handling Insured or by United Parcel Service, (UPS).

The above paragraph pertains only to Cornell's films; the university is more straightforward with respect to its slide sets: "Requests for previewing purchase slide sets cannot be honored . . ."

And rental is not even an option with Cornell's audio tapes: "Because of the high cost of handling orders relative to the purchase price, it is impractical to rent audio tapes." (See Section V for other examples of nonprofit preview policies.)

Unfairness to Society: Duplicative Products

Nonprofits frequently defend their foray into the free market by claiming their materials fill such specialized educational needs that commercial production is literally not profitable. This is the "thin market" argument which says, "There are too few customers for this product to

entice a for-profit company to sell it. The market is too thin or sparse." Without their product, nonprofits say, there would be no product.

This argument is quickly defeated by inquiring into the sales volume of the nonprofit's product. Most nonprofits sell several hundred of each A-V product they offer. Thomas Hope, president of Hope Reports, Inc., an A-V research and consulting firm, explains that most commercial producers must sell an average of 200-400 prints to break even on any given project. Thus, if nonprofits sell several hundred prints of a film, they are scarcely serving such a highly specialized need that a commercial firm wouldn't do it.

A California distributor of business and vocational education materials, and a NAVA member, comments, "There's a lot of overlap [between nonprofit and for-profit products], especially in the [microcomputer] courseware and vocational ed markets. How many different ways can you show how to rotate tires?"

A Pennsylvania producer/distributor of agricultural and industrial education materials, also a NAVA member, notes that Ohio State University was recently awarded a Department of Labor contract for products similar to those available from commercial firms. He believes that "at least 90% of whatever nonprofits have done is duplicative."

There are, of course, some truly specialized, non-duplicative products by nonprofits. Subjects for these products tend to reflect the specialized research equipment and other unique resources available only at the producing school. In other fields where film and video are used to record new developments, thin markets do exist for some products. Examples include MIT's engineering materials (e.g., "Van der Waals Forces—Influence of a Medium—Retardation—Lifshitz Method—Experiments," a video tape or film) and Johns Hopkins' medical materials (e.g., "The Technique of Laparoscopic Tubal Cauterization," a film or video cassette.)

Some government grant and contract monies earmarked for nonprofits have financed useless purchases—purchases which would never have been made by commercial firms seeking returns on their investments. For instance, in the case of WGVC-TV, discussed earlier, 600,000 state and federal dollars funded a mobile unit. But this, best unit in West Michigan, has a permanent parking place on the Grand Valley State College campus. "We can't really use it that much," the station's program director told *The Grand Rapids Press*.²⁸ "It takes about 10 people—half our staff—to run it. We just haven't been able to afford it."

When a nonprofit duplicates the work of a for-profit company, the taxpayer loses. Tax revenues are collected on the sales of successful for-profit products. No taxes are collected when nonprofits succeed in business. Given the extent of nonprofit competition (see Section V), these lost tax revenues appear to be substantial.

"When a nonprofit duplicates the work of a for-profit company, the taxpayer loses . . . these lost tax revenues appear to be substantial."

Nonprofit products, financed by state or federal funds, represent a triple drain on the taxpayer: (a) lost tax revenues on sales, (b) wasted tax revenues on their production, and (c) lost property taxes, employment taxes, and other fees generated by for-profit companies. A New York producer/distributor of vocational education materials sums it up: "Duplicative products cheat the taxpayers who fund them and rob the government of potential tax revenues."

Meanwhile, nonprofit organizations apply their "incidental" profits to the expansion of the profit-making activity—extending the product line, increasing the sales staff, financing additional advertising, etc. For example, Betty Decker acknowledges that Michigan State University's profits on the sales of its A-V materials are routinely plowed back into the development of new materials.²⁹

Nonprofit Productions Deal Losses to For-Profit Organizations

As the nonprofit competition grows, for-profit sales erode, leaving the industry two choices: drop competing products or raise prices to offset declining volume. Thomas Hope of Hope Reports, Inc. explains the pricing dilemma:

If a film project costs \$50,000, and each print is priced at \$250, then 200 prints must be sold to recover costs. But if only 50 prints can be sold [due to nonprofit competition], the price of each must increase four times—to \$1,000—to recover costs.

If similar price increases spread throughout the industry, says Hope, consumers would "stop buying educational films—this would trigger the collapse of the educational film business."

The alternative for A-V companies—to discontinue manufacturing competing products—is also self-destructive.

As nonprofits introduce additional duplicative products, more and more for-profit products would be displaced. Under either alternative, therefore, the industry shrinks and the consumer is offered far less in product selection.

"Creeping Socialism"

But in the long run, unfair competition has an even more devastating impact on society, an impact one NAVA member characterizes as "creeping socialism." Unfair competition not only constricts current business, but forecloses future business by discouraging private investment.

In the words of a Louisiana equipment and materials dealer and a NAVA member, "When they [nonprofits] say their material is not available commercially, it's a chicken-and-egg situation: if they're already selling it, there's no need for us. There's no incentive to compete against a nonprofit."

Ultimately, the only sources of A-V materials may well be government agencies and educational institutions. And because these agencies and most of the schools are state- or federally funded, Edward Meell (Media Management Services, Inc., Yardley, Pennsylvania) asks,

Has the Federal Government set in motion a process whereby the entire educational system and all the materials used in it [will be] dominated by public agencies? . . . how long will it be before there are no private publishers and producers and we have an educational system very similar to that found in a totalitarian state?³⁰

The answer, then, to the consumer who rents a "cheap" film from the local university, and to the legislators and regulators who allow this activity to continue, is simple: You may be getting a free lunch now, but wait 'til you see the price of dinner!

"Unfair competition not only constricts current business, but forecloses future business by discouraging private investment."

III. What Is Unfair Competition Doing to Private, For-Profit Companies?

Two recent studies, though not specifically on the subject of unfair competition, shed some light on the effects of nonprofit participation in the communications marketplace.

Study I

In connection with a suit filed by three A-V companies against the Erie County, New York, Board of Cooperative Educational Services, Thomas Hope, president of Hope Reports, Inc., a Rochester, New York, A-V research and consulting firm, studied the performance of commercial producers and distributors of educational A-V software.³¹

He found that over the 10-year period, 1972-1981, the fatality rate of this group more than doubled—from 3.45% (38 of a total 1,100 companies) to 8.6% (89 of a total 1,030 companies). In his study, Hope was concerned with the cooperative use and distribution of A-V materials among schools, but acknowledged that other aspects of unfair competition could also contribute to the decline of commercial firms (as could other unrelated factors, such as demographic changes and economic conditions).

In addition, Hope reported that the opportunity for unfair competition steadily increased, as more and more educational institutions acquired the necessary A-V equipment. Hope noted, for instance, that between 1970 and 1980, the percentage of school districts with video taping capabilities jumped from 58% to 86%, and for colleges and universities, from 65% to 98%.

Hope commented: "Many firms that rely entirely or even primarily on educational sales are having a tough time surviving."

Cooperatives May Force Dealers Out of Business

Hope also reported that nonprofit cooperatives ultimately threaten to replace A-V dealers. Nonprofit cooperative use hurts the commercial producers/distributors of A-V software, and nonprofit cooperative purchasing hurts the communications equipment dealers. When school districts or state education departments enter into such arrangements with manufacturers, the dealer "may be squeezed out of business," said Hope. (For examples of cooperative purchasing, see Illinois Department of Administrative Services, Minnesota Educational Computing Consortium, and Saginaw Intermediate School District in Section V of this report.)

Study II

Salvatore Parlato, national media evaluation coordinator, Captioned Films for the Deaf (Silver Spring, Maryland), has also analyzed the educational A-V marketplace.³² His

research, conducted in 1980, focused on the 289 organizations which sell or lease five or more educational films or video programs. (Hope estimated the size of the entire A-V industry to be 15,000 organizations, with roughly 1,000—7%—classified as educational institutions.)³³

Of the 39,300 titles offered by these 289 organizations, only 2% are available through other distributors. Because this figure is so low, Parlato has disregarded the effects of duplication in his study.

Parlato reported that 31, or 11%, of the total 289 are nonprofit foundations, societies, or professional associations; 18, or 6%, are schools and universities; and 9, or 3%, are religious groups. Assuming the few other nonprofits he noted (museums, public television stations, and state, federal, and international agencies) represent a conservative 1% of the total, then collectively, nonprofits account for 21% of the total number of competitors in the educational film/video business—a sizable portion by any standard.

Parlato also investigated pricing. Using a sample of "typical prices" from his study, nonprofit films were priced nearly 20% lower than commercial films—\$11.75 per minute compared to \$14.51 per minute. Moreover, among commercial distributors, video programs cost about 25% less than 16mm films; among nonprofits, however, they are about 33% less.

Impact on Individual A-V Businesses

In his testimony before the Small Business Administration, NAVA member Bennett Schultz (DCA Educational Products, Warrington, Pennsylvania) drawing from his own experience, described a sound/slide program in auto mechanics developed by the University of Georgia, which transferred reproduction rights to Clemson University "so that sets could be reproduced for any and all schools in South Carolina at the bare cost of reproduction. . . . In 1975, we sold more than \$12,000 worth of our automotive programs in South Carolina; in 1978, less than \$500. Did we lose out on the basis of quality or price?"³⁴

Many other A-V business owners are asking themselves this same question. Some typical experiences follow:

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A Delaware dealer and NAVA member: "I've had to collapse our [A-V] training services to the school market, largely because of unfair competition. I also sold a tutoring center that, as a for-profit, was always being turned down for state contracts. I sold it to a nonprofit church organization—now they are getting the state contracts."

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A **New York** producer/distributor of cultural records and cassettes: "National Public Radio [see entry in Section V] is in direct competition with us, the independent producers/distributors, for the public's and the schools' dollars. A couple of years ago, there was some discussion of using programs produced by independents as a major component of public radio broadcasting. Yet this has not transpired . . . profit-making companies are, by and large, barred from acquiring federal dollars to produce new programs. Federally funded or other 'nonprofit' ventures, however, have become high profit-making entities. What, in effect, has occurred is a new production formula: In exchange for allowing a 'free' broadcast (with all its publicity value), 'nonprofit' producers can acquire government seed money. If the program has appeal, they can then sell post-broadcast packaged programs or spin-offs and peripherals."

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An **Illinois** distributor of educational television programs and a NAVA member: "I think the nonprofit share is huge. That's why the commercial market is producing only a third as much as 10 years ago. If you take nonprofit instructional television alone, you're talking about \$4-\$5 million in lost sales [for commercial firms] each year, and taxes on those sales. We're losing a million a year to that kind of competition."

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A **Michigan** producer/distributor of educational courseware: "We usually see a one-to-one correspondence between the increase in computers in schools in our sales territory and the increase in sales [to those schools]. But because of MECC [Minnesota Educational Computing Consortium; see entry in Section V] licensing agreements, our sales are zip in Iowa and Minnesota, despite the increases in hardware there. . . . MECC even has an indirect influence. A Michigan intermediate school district pressured us by using MECC as leverage. They said, in effect, that they would not buy from us unless we gave them a licensing agreement similar to MECC's. We can't afford such terms."

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A **Minnesota** dealer and a NAVA member: "Our sales are heavily affected by MECC. Because of MECC, our customers [schools] are our own worst competitors. They turn their programs over to MECC for distribution. Members of MECC can copy software for practically nothing. Our sales would increase at least 50% if MECC were gone."

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A **Midwest** producer of educational courseware and a NAVA member: "Between the copying and the swapping and the nonprofit competition, there is a nickel to be made, but it is becoming less attractive. It's hard to say how much MECC has hurt our sales. But I'd guess they surpass us significantly in dollar volume and we're selling in seven figures. Wonder what their taxes would be, if they had to pay them?"

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A dealer and NAVA member: "I've sold 2,000 micro-computers and lots of educational courseware in the South, but only 200 micros and very little courseware in Minnesota, where MECC has locked up the market. MECC is badmouthing all but its own courseware. They could destroy us [in Minnesota] if we get on their blacklist."

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A **New Jersey** distributor of educational materials "lost a couple of good sales reps" because the company enforced a policy statement urging the reps to refuse to carry competing products sold by nonprofits. "We are not against anyone who, through plain old hard work and initiative, develops a product and builds a company based on it. But we will aggressively lobby against anything that will allow the same product to be financed by our tax dollars."

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A **Connecticut** producer/distributor of educational materials: "National Geographic and Consumers Union [see entries in Section V] enjoy tax-free status. Why they have it, why the government goes along with the charade decade after decade, administration after administration, is another question. They can afford to spend significantly more than NAVA producer-members spend for a production—because they are tax-free. Then they sell those products, using expensive sales promotion and direct mail pieces, to the schools in direct competition with NAVA members. Who can compete with them? In a shrinking market, why must we have buying dollars diverted to a few favored competitors?"

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A **Pennsylvania** A-V consultant: "If schools like those in Montclair, Dallas, and Dade County are going into the publishing and audio-visual business, shouldn't it be as for-profit organizations who compete on equal footing and also pay taxes on their revenue?"

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A **Tennessee** dealer and NAVA member: "We're losing \$250,000 in sales per year to the Tennessee department of education which distributes its products free of charge. We expect this figure to increase as they develop additional products, unless we can stop them or reach some kind of agreement."

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An **Oklahoma** dealer and NAVA member: "Numerous Texas schools are using educational programs produced by [state] service centers. There's no way this doesn't seriously limit your market. Some of the federally funded products have even been adopted for statewide use."

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An **Oklahoma** producer/distributor and NAVA member: "Our sales would increase by \$250,000 a year, at a minimum, if we weren't up against products sold by the Texas schools."

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A **Midwest** dealer and NAVA member "got out of repairing microcomputers" because the state's regional education agencies began offering repair services. "I repair printers now because they don't do that yet, but my service department has dropped from 14 to 8 people because of their competition." Similarly, this dealer abandoned his film rental business some years ago: "I donated \$85,000 worth of inventory to church schools because the state agencies' film lending had wiped out 100% of my market."

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A **New York** producer/distributor of vocational education materials: "If I weren't competing against nonprofits, my sales would be up \$500,000 to \$1 million per year."

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A **Rhode Island** dealer and NAVA member: "I'd estimate that 10-15% of all A-V dollars are going to nonprofits."

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A Success Story: The University of Arizona Versus Tucson Recording Studios

On July 1, 1980, the University of Arizona purchased, for \$145,000, a Tucson recording studio described by one university music professor as having "some of the best equipment between Dallas and Los Angeles . . . state-of-the art."³⁵ Ostensibly, the studio was acquired for educational purposes. But Assistant Executive Vice President William Noyes conceded that it may take as long as three years from date of purchase before an "official academic program" in sound engineering could be established.³⁶

In the meantime, the university studio began accepting commercial recording business. The ensuing story of the school's short-lived venture into commercial recording was closely chronicled by both the university newspaper and the *Arizona Daily Star*.

Four commercial Tucson studios—Westwood Recording, SyntheSound, Marsound, and Autograph Recording—first complained to the university on July 10, shortly after the studio's purchase. During the next eight months, while discussion proceeded, the studio continued to operate.

The *Arizona Daily Star* reported in February 1981³⁷ that, during its first six months under university ownership, the studio lost \$16,000 (operating expenses were estimated at \$70,000 annually). Nevertheless, during that same period, studio records showed revenues of \$17,000 from commercial clients.

Prices charged these clients were about the same as, or lower than, prices charged by the commercial studios. Only one professor was using the studio for teaching and no students were learning to use the equipment. "In almost every sense, the university has been operating a profit-seeking business," the paper concluded.³⁸

The commercial studios suffered the loss of that \$17,000. "I'd say the university was taking as much as 60% of the local recording business," said Karl Morton, who owned SyntheSound. "The biggest advertiser in town went to them."

Initially, the university responded to the studios' cries of unfair competition by declaring that it would simply raise the prices charged its clients. But in a January 1981 letter to Noyes, the owners of the four studios explained why pricing policies would not reach the root of the problem:

We maintain that nominal pricing differentiations, even if they were followed, have little, if any, bearing on the university's position as our business competitor. The fact remains that we are adamant in our belief that it is improper that the University of Arizona continue to pit its governmentally derived/tax-based economic power against small business in the Tucson marketplace.³⁹

On March 2, 1981, the university announced that it would no longer sell recording time or materials to commercial enterprises.

"My business jumped by 30% when they shut down," said SyntheSound owner Karl Morton.

Ironically, university guidelines⁴⁰ specifically proscribed "unfair competition," noting:

When a unit of a university becomes, in essence, an independent business primarily serving non-university persons, its continued existence as a legitimate part of the university must be seriously questioned.

After much private prodding and public scrutiny, the school decided to follow its own advice.

IV. What Is the Solution to the Problem of Unfair Competition?

What can be done to halt the erosion of the for-profit sector (and the U.S. tax base) by nonprofits? No single remedy will likely solve such a complex, wide-ranging problem. But here are some directions for potential remedial action to take.

In Section II on pages 3-7, we identified three special

privileges that nonprofits bring with them to the commercial marketplace: tax exemption, nonprofit postal rates, and government grant or contract funds. The remedial actions discussed in this section, while not the only available options, would go a long way toward equalizing nonprofit competition wherever and whenever it occurs.

Administrative Action: Revision of OMB Circular A-76

This circular, issued by the Office of Management and Budget (OMB) in 1967 and revised in 1979, tells executive departments (e.g., Labor, Education) how to decide whether to perform an activity in-house or to contract it out. Although the 1979 revision states in the Background section, "It has been and continues to be the general policy of the Government to rely on *competitive private enterprise* [emphasis added] to supply the products and services it needs,"⁴¹ the section which sets forth policy reads:⁴²

4.a. *Rely on the Private Sector.* The Government's business is not to be in business. Where private sources are available, they should be looked to first to provide the commercial or industrial goods and services needed by the Government . . .

Apparently, this section has been interpreted to mean reliance on *either* private for-profit or private nonprofit organizations. The circular should be made consistent by revising Section 4.a. to reflect reliance on competitive private enterprise. Such a revision would help curtail the practice, common at many agencies, of designating grants and contracts for nonprofits only.

There are two drawbacks associated with Circular A-76: (a) it does not apply to independent government agencies and (b) it does not have the force and effect of law. Legislative action is needed to overcome these drawbacks. Indeed, the General Accounting Office, the investigative arm of Congress, recommended remedial legislation in 1978, and again in 1981, to insure that A-76 is uniformly applied by all agencies.⁴³

Legislative Action: The Hayakawa and the East Bills

In 1981, Senator S. I. (Sam) Hayakawa (R-CA) held extensive hearings on unfair competition (referenced in Section I).⁴⁴ In June of that year, Hayakawa introduced a resolution, which would be administered by OMB, "to clarify and reaffirm that it is the basic policy of the Government of the United States to rely on the competitive private enterprise system to provide needed goods and services."⁴⁵

In 1982, Senator John East (R-NC) introduced "The Economy in Government Act of 1982" (S. 2278) which would "provide a policy of promoting public sector procurement of goods and services from profit-making business concerns."⁴⁶ This bill would prohibit not only federal agencies, but also state and local governments, from using federal funds to provide products and services already available from the private sector.

S. 2278 could be improved by extending its coverage to nonprofit organizations.⁴⁷

The key provision would then read:

. . . no State, political subdivision thereof, or nonprofit organization use Federal financial assistance to start or conduct any commercial or industrial activity . . .

Without this amendment, the bill would prevent a state university from using federal funds to underwrite a business activity, but not a private university. Because their funding source is the same, the same rules should apply.

Even if amended, the legislation discussed above would fall short of a viable solution. Privately financed nonprofits would still be free to use their special nonprofit privileges to compete unfairly in the commercial marketplace. To reach those groups, additional action is needed.

Regulatory Action: The Postal Service and the IRS

The majority of nonprofit print materials intended for distribution are preprinted with the nonprofit postal indicia. Some nonprofits, however, voluntarily pay the same postage as commercial firms. The Postal Service should investigate those that don't.

The Internal Revenue Code requires that all nonprofits be taxed at corporate rates on any "unrelated business income" (UBI).⁴⁸ This provision, enacted in 1950 and expanded in 1969, was specifically intended to curb "the unfair competition which exists when a tax-exempt organization engages in competition with tax-paying business."⁴⁹

The use of the unrelated business income is irrelevant for tax purposes; that is, if the business is unrelated to the organization's nonprofit function, the organization will be taxed, even though the revenues generated are to be used to further that function.⁵⁰ Moreover, the courts have determined that the unrelated business must remain incidental to the exempt purpose. If it becomes the primary activity of the organization, nonprofit status is jeopardized.⁵¹

Unfortunately, the UBI rules are so amorphous that nonprofits can easily evade them. Most educational institutions and associations successfully argue that income from sales of A-V products is related to their educational purposes and, therefore, tax-exempt. Nonprofits are given the widest possible latitude in interpreting what is related and what is not.

When the Montclair, New Jersey, school district decided to offset federal funding cuts by going into business (see page 3), its law firm commented: "Even if the district opened a used-car lot, if students repaired the cars and sold them as part of shop and business classes, it might well be lawful."⁵²

As noted in several of the entries in Section V of this report (see for example, California Polytechnic State University, Educational Resources Foundation, and University of Texas), many nonprofits establish their educational A-V activities as separate divisions, departments, or even separate nonprofit corporations. The separate entities are then expected to operate like any for-profit business, with continued operation and growth completely dependent upon revenues from sale of product. Here, certainly, nonprofit profits, far from being incidental, are in fact essential. Yet the organizations successfully argue that the commercial activity is incidental to the school or association as a whole.

The UBI rules need to be reexamined, with a view toward fulfilling their original purpose by eliminating, or at least minimizing, these loopholes.

Herbert Bailey, Jr., director of the Princeton University Press, recently described the proper role of university presses: "They publish research scholarship in a wide variety of fields, which hardly any other publishers do. That is the main reason for the existence of university presses; it is also why they are tax-exempt."⁵³

When a university press strays from that path and begins producing and distributing for the public at large, it may encounter trouble with the IRS.

"There might be instances where certain university press books, like encyclopedias, Bibles, or dictionaries, would be considered for-profit by the IRS," says Jerome Lewis, financial and legal administrator for the Association of American University Presses. "In that case, some part of a university press's revenues might be taxed."⁵⁴ If the IRS is capable of making such distinctions with print materials, why not with A-V materials?



V. The Extent of Unfair Competition

This section catalogs some of the best-known and most active of nonprofit competitors in the communications industry. For an explanation of how these examples were selected, see page 2.

In order to understand the competitive significance of the information highlighted for each organization, including quotations from sales literature, this section must be read in conjunction with the section labeled "How Nonprofits Compete Unfairly" in this report.

All examples are arranged alphabetically, with subject indices immediately following. An asterisk preceding an entry indicates that an exhibit relating to that organization appears in Section VII. Section V concludes with a chart illustrating the types of sales promotional activities of selected nonprofit competitors.

Information for each entry is only as complete as time constraints permitted. Where sales catalogs were avail-

able, or the organization was otherwise active in promoting its activities, the information given reflects the full range of the organization's products and services.

In some instances, however, only fragmentary information relating to specific products or projects was available. If the organization is also mentioned as listed in an A-V directory, the group may be producing other similar materials.

Funding information posed special problems. Therefore, where no funding source is named, it should not be assumed that the nonprofit is self-sustaining, because undisclosed federal or state funding remains a distinct possibility. As one A-V executive complained recently, "In order to attack the practice, you've got to find out where the funding for each project came from, go to that funding source, and then find out what, if any, restrictions on sales are spelled out in that grant or contract. Of course, there's no way to get that information."

Catalog of Unfair Nonprofit Competitors

AEROSPACE EDUCATION FOUNDATION, Washington, D.C. A nonprofit affiliate of the Air Force Association. "For the education of the public at large to a greater understanding of aerospace development." Sales catalog, mailed at nonprofit postal rate, lists 58 U.S. Air Force-developed course packages (sound/slide sets or video tapes) in automotive mechanics, communication arts, computer science, construction trades, education, electronics, environmental control, metal trades, paramedicine and health care, and miscellaneous—but not a single space-related title. Sold to "more than 850 schools, training centers, and colleges" at "cost of reproduction." Catalog includes a "technical note on film quality—in some cases, the poor condition of the prints from which we were forced to make videotape transcriptions of films made top quality results impossible. . . . We think you will find, however, that despite these deficiencies, these transcriptions will be adequate." Listed in *Video Source Book* (see page 20 for citation) and *EITV* magazine's 11/81 "Annual Directory of Program Sources."

AGENCY FOR INSTRUCTIONAL TELEVISION, Bloomington, Indiana. A nonprofit American/Canadian organization, created in 1973, which sells and rents 2,000 programs (broadcast video tapes, films, or video cassettes) in more than 100 series, most of which were produced with tax and grant dollars by state and local agencies. Has also produced 11 "consortium series" (with three others underway), jointly developed and financed with groups of state and provincial agencies. All 50 states and 7 provinces have participated in one or more of these consortia. School systems within the service areas of participating agencies receive special broadcast/duplication rights and discounted prices. AIT allows unlimited duplication and broadcast for an annual fee based on school population or charges one-time fees per duplication: 50% of purchase price for the first copy, 40% for the second, and 30% for each additional copy. A free "bonus" print or cassette is received if any 10 or more are purchased in a year. Programs cover all subject areas for all grade levels and adults. Sales catalog mailed at nonprofit postal rate.

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AIT's predecessor organization, the National Instructional Television Center (NIT) was a nonprofit, "self-supporting" division of the Indiana University Foundation. For the first five years of its existence (1962-67), NIT was funded by the former U.S. Office of Education. See chart, page 25, for promotional activities.

ALAMEDA COUNTY SCHOOLS, California. Produce and distribute a series of four video cassettes on microcomputers in the classroom. Available for \$50 each or \$160 for all four.⁵³ Listed in *Video Source Book*.

AMERICAN ASSOCIATION FOR VOCATIONAL INSTRUCTIONAL MATERIALS, Athens, Georgia. A nonprofit organization of state departments of vocational education and voc-ed schools at colleges and universities. Affiliated with the University of Georgia. "Purpose is to provide instructional materials."⁵⁶ Catalog lists 32 vocational education course items, half of which include overhead transparencies, slides, filmstrips, and cassette tapes; available for purchase only. Listed in *Industrial Education* magazine's 12/81 "Annual Buying Directory." Exhibited at the American Vocational Association's 12/81 and 12/82 conferences.

AMERICAN COLLEGE TESTING PROGRAM, Iowa City, Iowa. A nonprofit organization which produces and distributes guidance-oriented programs for high school and college students. Listed under "audiovisual software" in *VocEd* magazine's Jan/Feb '82 "Directory of Suppliers." Advertises in *VocEd*.

UNIVERSITY OF ARIZONA, Tucson, Arizona. A state-supported school which produces, sells, and rents video tapes and video cassettes in business, agriculture, home economics, mathematics, and science for college students and adults. Also offers production services for others. Listed in *Video Source Book* and *Audiovisual Market Place* (see page 20 for citations). Advertises in *American School Board Journal*. (See also "A Success Story" in Section III of this report.)

ASSOCIATION FOR CONTINUING EDUCATION, Stanford, California. A nonprofit membership corporation founded by the government and industry groups which formed the Stanford Instructional Television Network. Courses are offered live over the network and recorded off-the-air for sale. Catalog lists 32 video cassettes in administration, communication, electronics, technology, and mathematics for college students and adults. Brochure notes that "courses are also available for sale to non-members, as part of a plan to expand into other markets." Listed in *EITV* magazine's 11/81 "Annual Directory of Program Sources."

BRIGHAM YOUNG UNIVERSITY, Media Marketing, Provo, Utah. A nonprofit, independent, religious school which produces and sells audio and video cassettes, films, and sound filmstrips in all subject areas and for all grade levels. Also offers production services for others and distributes materials produced elsewhere. Listed in

Video Source Book, *Audiovisual Market Place*, and *EITV* magazine's 11/81 "Annual Directory of Program Sources."

UNIVERSITY OF CALIFORNIA, Extension Media Center, Berkeley, California. A state-supported school which sells and rents films, audio and video tapes, and cassettes in all subjects for adults and college students. Listed in *Video Source Book*, *Audiovisual Market Place*, and *Instructional Innovator* magazine's 5/81 "Directory of Suppliers."

***CALIFORNIA POLYTECHNIC STATE UNIVERSITY**, San Luis Obispo, California. A state-supported school which operates a Vocational Education Productions service through a university nonprofit corporation. This service produces and sells more than 200 items in agricultural education, including sound and silent filmstrips, audio cassettes, slides, and overhead transparencies. Order form requires addition of state sales tax to purchase price. Listed in *Audiovisual Market Place* and *VocEd* magazine's Jan/Feb '82 "Directory of Suppliers." Advertises in *VocEd*. Receives grants funded under the Federal Vocational Education Act. "Operated on a self-support basis."⁵⁷

Center for Occupational Curriculum Development—See **UNIVERSITY OF TEXAS**.

CENTER FOR SOUTHERN FOLKLORE, Memphis, Tennessee. A nonprofit association which produces, sells, and rents films, audio and video cassettes, records, and slide/tape programs in folk music, art, literature, and lifestyles for all grade levels and adults. Supported by federal tax funds from the National Endowment for the Humanities. See chart, page 25, for promotional activities.

CLEMSON UNIVERSITY, Clemson, South Carolina. A state-supported school which is testing microcomputer courseware, in cooperation with the PICA Foundation (see separate entry), for distribution to industrial training programs and industrial education classes.⁵⁸

CLOSE UP FOUNDATION, Arlington, Virginia. A nonprofit association which promotes government studies and telecasts over the Cable-Satellite Public Affairs Network. Offers free off-air taping rights to individuals and schools using the materials for instructional purposes, and produces, sells, and rents video cassettes for all others. The "core" of the Foundation's financial base is a Congressionally established fellowship program.⁵⁹ Listed in *Instructional Innovator* magazine's 5/81 "Directory of Suppliers."

CLOVIS UNIFIED SCHOOL DISTRICT, California. Produces and sells financial/budgeting/accounting software packages, ranging in price from \$15,000 to \$35,000.⁶⁰

***COAST TELECOURSES: THE COAST COMMUNITY COLLEGES**, Fountain Valley, California. Coast Telecourses is the marketing and distribution division of three district-supported community colleges (Coastline Community College, Orange Coast College, and Golden West College), which together own and operate a PBS television station. Advertises as "the nation's leading producer of high quality telecourses," "offers more adult-level, total learning systems than any other producer/distributor in North America," "used at more than 1,000 locations." Produces, sells, and leases video and audio tapes and cassettes and broadcast tapes in all subjects for college students and adults. Catalog lists 18 course series, each available as a complete set, or in modules, or as individual programs. Also offers production services for others and distributes materials produced elsewhere. See chart, page 25, for promotional activities.

UNIVERSITY OF COLORADO, Educational Media Center, Boulder, Colorado. A state-supported school which offers for rent 5,700 films produced by 600 schools, associations, and corporations. Films cover all subjects for all grade levels and adults. Rental fees range from \$7 to \$21.50 (depending on running time) for nonprofits, but all "commercial organizations and individuals" are charged \$25 per reel.⁶¹ The university also rents its TV facilities and equipment, and offers complete video production and post-production services, script writing, and film and video tape distribution. See chart, page 25, for promotional activities.

CONDUIT, Iowa City, Iowa. A nonprofit organization formed by five regional computer centers (Computers at Oregon State, North Carolina Educational Computing Service, Dartmouth College, and the Universities of Iowa and Texas at Austin) to sell microcomputer software for the Apple, TRS-80, PET, and Atari computers. Catalog lists about 30 programs for college students in biology, chemistry, humanities, mathematics, physics, psychology, sociology, and statistics. Written by college and university faculty members, who receive royalties. For most programs, after the consumer purchases an initial package, additional copies of the software are available for "a nominal fee," generally \$10 each. "As a nonprofit organization we are unable to offer complimentary copies of our materials for review." Conduit is affiliated with the University of Iowa and funded by the National Science Foundation and the (federal) Fund for the Improvement of Postsecondary Education.

CONSUMERS UNION, Mount Vernon, New York. A nonprofit organization for the testing of consumer products. Income derived from sale of magazine. Produces, sells, and rents 16 filmstrips and 7 films on consumer education topics for grades 7-12 and adults. Cassettes also available for purchase only. "Films are not available for preview prior to rental."⁶² Listed in *Video Source Book* and *Audiovisual Market Place*.

CORNELL UNIVERSITY, Audio-Visual Resource Center, Ithaca, New York. A private, nonprofit school which produces, sells, and rents 1,100 films, slide sets, and video and audio tapes, in all subjects for all grade levels and adults. Includes materials produced by other schools, associations, and corporations. See page 6 for a discussion of Cornell's preview policies. Listed in *Video Source Book*, *Audiovisual Market Place*, and *EITV* magazine's 11/81 "Annual Directory of Program Sources."

DALLAS COUNTY COMMUNITY COLLEGE DISTRICT, Center for Telecommunications, Texas. Produces and distributes nine telecourses for college students.⁶³ Listed in *Video Source Book* and *Instructional Innovator* magazine's 5/81 "Directory of Suppliers." Exhibited at the Association for Educational Communications & Technology's 1982 convention.

DALLAS INDEPENDENT SCHOOL DISTRICT, Texas. Produces and sells microcomputer courseware for primary grades. See also Foundation for Quality Education, Inc.

DAUGHTERS OF ST. PAUL, Boston, Massachusetts. A nonprofit religious association which produces, sells, and rents slide sets, records, films and filmstrips, and audio and video cassettes in religious and communications subjects for all grade levels and adults. Listed in *Video Source Book* and *Audiovisual Market Place*.

EAST TEXAS STATE UNIVERSITY, Commerce, Texas. A state-supported school which produces and sells slides, transparencies, and audio cassettes in office and industrial education for high school, college, and special-needs students. Catalog, mailed at nonprofit postal rate, lists about 75 items available with A-V materials. Distributed through the school's Occupational Curriculum Laboratory, which is funded by the Texas Education Agency. Also distributes materials produced by the Mid-America Vocational Curriculum Consortium (see separate entry). Exhibited at the American Vocational Association's 12/81 conference.

EDUCATION DEVELOPMENT CENTER, INC., Newton, Massachusetts. A nonprofit corporation which sells and rents about 150 films, many of which were produced by other organizations or individuals. Also available as video cassettes for purchase only. Subject areas include women's issues, childhood education, health and medicine, science and technology, and social studies for high school and college students and adults. "EDC does not send out films for no-charge previews. Normal rental fees are charged for screening films. . . ."⁶⁴ Each EDC project has its own funding and staff; some are funded by the U.S. Department of Education. "Because EDC is funded by the WEEA program within the [federal] Office of Education, these materials are sold at cost and are very reasonably priced." About 180 additional EDC-developed educational films are available through commercial distributors. Also offers production services for others. See chart, page 25, for promotional activities.

***EDUCATIONAL RESOURCES FOUNDATION, Columbia, South Carolina.** A nonprofit affiliate of the South Carolina Educational Television Network. Produces, sells, and rents films, video cassettes, audio tapes, and slide/tape programs for 25 courses in job skills, supervisory skills, secretarial training, economic education, and safety. "Many of the educational programs of the Foundation are produced in cooperation with South Carolina, regional, or national associations and educational organizations. . . . The Foundation . . . receives no federal or state funds. Money generated by the sale or rental of its resources provides the funds for continued service."⁶⁵ Also distributes materials produced elsewhere and makes its materials available through commercial distributors. South Carolina purchasers are charged a state sales tax and are "eligible" for a 25% price discount. "ERF chooses to sell to libraries at normal retail prices realizing that libraries may charge fees for usage. ERF chooses to allow consultants to use our materials with their clients on a normal rental basis. Consultants may not purchase video components for long-term unrestricted use." See chart, page 25, for promotional activities.

ESSEX COUNTY COLLEGE, Newark, New Jersey. A district-supported school which rents video and audio recording facilities and equipment. Advertises as "New Jersey's secret studio . . . just 20 minutes from midtown Manhattan."⁶⁶

FOUNDATION FOR QUALITY EDUCATION, INC. A defunct, nonprofit corporation organized in 1977 to solicit contributions to, and market the educational products (including microcomputer courseware) of, the Dallas Independent School District (see separate entry). Collapsed in 1979 amid financial irregularities.⁶⁷ Materials now marketed directly by the school district.

GREAT PLAINS NATIONAL INSTRUCTIONAL TELEVISION LIBRARY, Lincoln, Nebraska. A "service agency" of the state-supported University of Nebraska. Produces and distributes slides, films, video tapes and cassettes, and broadcast programming for all grade levels and adults in all subject areas. Listed in *Instructional Innovator* magazine's 5/81 "Directory of Suppliers."

HARVARD UNIVERSITY PRESS, Cambridge, Massachusetts. The publishing arm of the Harvard University, a private, nonprofit school. Produces and distributes slides, filmstrips, and audio cassettes in the humanities and social sciences for college students and adults. Also distributes materials produced elsewhere and makes its own materials available through commercial distributors. Listed in *Audiovisual Market Place* and *Instructional Innovator* magazine's 5/81 "Directory of Suppliers." Advertises in *Instructional Innovator*.

ILLINOIS DEPARTMENT OF ADMINISTRATIVE SERVICES, Springfield, Illinois. Has contracted with Tandy Corporation for the direct supply of microcomputers to Illinois schools, thereby bypassing dealers and distributors.⁶⁸

UNIVERSITY OF IOWA, Audiovisual Center, Iowa City, Iowa. A state-supported school which produces, sells, and rents transparencies, slides, films and filmstrips, audio tapes and cassettes, and video tapes and cassettes in all subject areas for all grade levels and adults. Also offers production services for others. Listed in *Video Source Book* and *Audiovisual Market Place*. See also Conduit.

MARYLAND CENTER FOR PUBLIC BROADCASTING, Owings Mills, Maryland. Sells and rents its own and other PBS stations' video cassettes. Catalog lists about 100 programs and series categorized as drama and documentaries, performing arts, children's programs, how-to and consumer programs, and telecourses. See chart, page 25, for promotional activities.

MASSACHUSETTS INSTITUTE OF TECHNOLOGY, Cambridge, Massachusetts. A private, nonprofit school which produces, sells, and rents films and video cassettes in science, engineering, mathematics, and management for college students and professionals. See discussion of products on page 6. Listed in *Video Source Book* and *Audiovisual Market Place*.

MIAMI-DADE COMMUNITY COLLEGE, Miami, Florida. A state- and locally supported school which produces and distributes telecourses for college students. Listed in *Instructional Innovator* magazine's 5/81 "Directory of Suppliers." Exhibited at the Association for Educational Communications & Technology's 1982 convention.

UNIVERSITY OF MICHIGAN, Michigan Media, Ann Arbor, Michigan. A state-supported school which produces, sells, and rents slides, films and filmstrips, video tapes and cassettes, and audio tapes and cassettes in all subject areas for all grade levels and adults. Also offers production services for others. Listed in *Video Source Book* and *Audiovisual Market Place*.

MICHIGAN STATE UNIVERSITY, Instructional Media Center, East Lansing, Michigan. A state-supported school which produces, sells, and rents 400 films, video cassettes, and slide/tape programs in all subject areas for college students. See discussion of pricing on page 4. Listed in *Video Source Book* and *EITV* magazine's 11/81 "Annual Directory of Program Sources."

MICRO-IDEAS, Glenview, Illinois. A project of six Illinois school districts, funded in 1980-82 by federal grants, but which expects to become self-sustaining through membership fees. Membership is restricted to school districts within a 50-mile radius of Chicago with student enrollments less than 25,000, and to colleges, museums, and libraries with no location restriction. Yearly dues (maximum for 1982-83 school year is \$10,000) entitle district members to automatic membership in the Minnesota Educational Computing Consortium (see separate entry) at no additional charge, access to "special collective bids" for microcomputer hardware and software, copies of selected software and participation in a software lending library of commercially pro-

duced, copyrighted programs valued at \$20,000 (Micro-Ideas plans to double the size of this library in 1982-83), in-service training valued at \$6,750, technical assistance, professional consulting in educational applications, and software reviews and other publications.

UNIVERSITY OF MID-AMERICA, Lincoln, Nebraska. A nonprofit corporation governed and administered by a consortium of 11 midwestern state-supported universities (Iowa, Iowa State, Kansas, Kansas State, Minnesota, Missouri, Nebraska, North Dakota, North Dakota State, South Dakota, and South Dakota State). Produces, sells, and leases films, video and audio cassettes, and broadcast tapes for 12 series in history, art, business, and social issues for college students and adults. Also offers production services and distributes materials produced elsewhere. "Funded principally by the National Institute of Education."⁶⁹ See chart, page 25, for promotional activities.

MID-AMERICA VOCATIONAL CURRICULUM CONSORTIUM, Stillwater, Oklahoma. An organization of 10 state education departments (North Dakota, South Dakota, Nebraska, Colorado, Kansas, Missouri, Arkansas, Oklahoma, Texas, and Louisiana) which produces and sells nearly 50 vocational education course packages, about half of which include transparencies or slide/tape programs. Listed in *Industrial Education* magazine's 12/81 "Annual Buying Directory." Exhibited at the American Vocational Association's 12/81 and 12/82 conferences. Advertises in *VocEd*.

MINNESOTA EDUCATIONAL COMPUTING CONSORTIUM, St. Paul, Minnesota. A nonprofit organization created by the state of Minnesota in 1973 and comprised of the University of Minnesota, the state university system, the community college system, and the state department of education, representing 430 school districts and 30 institutions of higher education. Enters into statewide contracts for the purchase of microcomputers (Apple and Atari) by schools and colleges. A staff of 25, including high school and college students, produces and distributes microcomputer courseware (about 250 programs) in all subject areas for all grade levels. Minnesota residents can purchase courseware "for cost of reproduction." Minnesota school districts and colleges can not only make low-cost purchases, but may also duplicate for educational use. Other states and out-of-state schools, school districts, and agencies may become MECC members (yearly dues required) and receive the same hardware discounts and software purchase and duplication privileges. According to *Newsweek* magazine,⁷⁰ MECC's out-of-state sales cover about 90% of Minnesota's costs. "It's the best deal since motherhood and apple pie," MECC's deputy executive director told *Newsweek*. MECC courseware is also available through eight commercial distributors. Finally, MECC offers consulting in the educational uses of microcomputers at a daily rate of \$300 plus travel expenses. Publishes articles in the trade press.⁷¹

MISSISSIPPI DEPARTMENT OF VOCATIONAL/TECHNICAL EDUCATION, Jackson, Mississippi. Has developed a \$100,000 mobile multimedia unit to produce industrial training slide sets and video and audio tapes onsite.⁷²

UNIVERSITY OF MISSOURI, Instructional Materials Laboratory, Columbia, Missouri. A state-supported school which produces and sells about 500 course packages in vocational agriculture, business and office skills, cooperative education, marketing, home economics, industrial education, sex equity, and special needs for high school, college, and special-needs students. Most include transparencies, slides, filmstrips, and cassette tapes. Also distributes voc-ed materials produced by other schools and state agencies. Missouri educators may borrow materials on a free-loan basis. Residents are charged the state sales tax on purchases; out-of-state purchasers are charged a 6.5% "price accrual." Brochure notes that "for more than twelve years we have devoted our entire energy into producing instructional materials . . . at as low a cost as possible. This is possible because IML is nonprofit and because of a sincere interest in meeting vocational needs of students and instructors." Listed in *Audiovisual Market Place*. Exhibited at the American Vocational Association's 12/81 and 12/82 conferences.

MONTCLAIR PUBLIC SCHOOL SYSTEM, New Jersey. School board announced in 1981 that it would begin offsetting federal funding cuts through sale of products and services, including data processing, publishing, consulting, and school supplies. Also intends to bid on government contracts for educational materials and workshops. Ironically, the media center at nearby Montclair State College, a state-supported school, has an unwritten policy not to compete with commercial enterprise because "there are several A-V and TV vendors already in the area," according to Robert Ruezinsky, the center's director. The center honors all A-V requests (e.g., for slide production by college staff or for rental of studio time and equipment) from nonprofit organizations at no charge, but denies all requests "of a commercial nature."

MT. SAN JACINTO COLLEGE, San Jacinto, California. A district-supported school which produces and sells about 300 films and video cassettes in business, health, and vocational education for college students and adults. Materials also available through commercial distributors.

NATIONAL ASSOCIATION OF COUNTIES, Washington, D.C. A nonprofit organization which offers "complete video services" for others, from conception through production and distribution. "We are able to serve our clients' videotape needs at much less cost than charged by most major commercial studios."⁷³

National Center for Research in Vocational Education—See OHIO STATE UNIVERSITY.

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NATIONAL COUNCIL OF CHURCHES, New York, New York. A nonprofit federation of churches which sells about 55 films and video cassettes "for church and secular audiences," most of which were produced by commercial television networks. A few are available only to religious groups; all are priced at "actual costs incurred." Subject areas include religion, health, social science, and ethical/moral issues for high school and college students and adults. Also available for rental through EcuFilm (Nashville, Tennessee), in which NCC and other church groups participate. EcuFilm, an ecumenical film/video distribution service, "eliminates the variations in rental fees and policies among various distributors."⁷⁴ NCC is listed in *Audiovisual Market Place* and *EITV* magazine's 11/81 "Annual Directory of Program Sources."

NATIONAL GALLERY OF ART, Washington, D.C. A gallery affiliated with the U.S. government which produces and distributes, on a free-loan basis, slides, films, and video tapes and cassettes in the arts and humanities for all grade levels and adults. Listed in *Video Source Book*, *Audiovisual Market Place*, and *Instructional Innovator* magazine's 5/81 "Directory of Suppliers."

***NATIONAL GEOGRAPHIC SOCIETY**, Educational Services, Washington, D.C. A nonprofit organization which, through its Educational Services division, produces, sells, and rents 500 films and filmstrips, records, audio and video cassettes, and video tapes in all subject areas for all grade levels and adults. In general, the A-V materials produced for schools by Educational Services are unrelated to the Society's research expeditions. See discussion of product on page 5. See chart, page 25, for promotional activities.

NATIONAL PUBLIC RADIO, Washington, D.C. A nonprofit organization which produces and distributes more than 300 educational audio cassettes in all subject areas for high school and college students and adults. Funded primarily by the nonprofit, Congressionally established Corporation for Public Broadcasting. Listed in *Instructional Innovator* magazine's 5/81 "Directory of Suppliers." Exhibited at the Association for Educational Communications & Technology's 1982 convention. Advertises in *Instructional Innovator*.

Occupational Curriculum Laboratory—See **EAST TEXAS STATE UNIVERSITY**.

OHIO UNIVERSITY, Telecommunications Center, Athens, Ohio. A state-supported school which produces, sells, and rents 40 video tapes and cassettes in art, communications, and child development for college students and adults. Listed in *Video Source Book* and *EITV* magazine's 11/81 "Annual Directory of Program Sources."

OHIO STATE UNIVERSITY, National Center for Research in Vocational Education, Columbus, Ohio. A nonprofit organization which, in addition to producing and distributing mostly print materials in voc-ed, conducts federally funded "special projects." Such projects

include technology adaptation, evaluation of career guidance counseling, community-based guidance training, and technical assistance and training for occupational skills. Exhibited at the American Vocational Association's 12/81 conference.

***OKLAHOMA DEPARTMENT OF VOCATIONAL AND TECHNICAL EDUCATION**, Stillwater, Oklahoma. In a joint effort with the Associated General Contractors of America (a nonprofit), this state agency produces and sells about 150 vocational education course packages in agriculture, business and office skills, career development, marketing, health occupations, home economics, industrial education, and special programs for high school and college students and adults. Many include transparencies or slide/tape sets. The productivity division of this agency also offers voc-ed training services to Oklahoma schools and businesses. "The only cost to companies using this program . . . is for materials used."⁷⁵ Listed in *VocEd* magazine's Jan/Feb '82 "Directory of Suppliers." Exhibited at the American Vocational Association's 12/81 conference. Advertises in *VocEd*.

PBS VIDEO, Washington, D.C. A nonprofit organization which sells 2,300 programs (as video cassettes) of public broadcasting stations. All subject areas for all grade levels and adults. Sales catalog unavailable at time of this project because "demand is so high, we can't keep it in stock." See chart, page 25, for promotional activities.

PENNSYLVANIA DEPARTMENT OF EDUCATION, Harrisburg, Pennsylvania. Through its 28 regional service centers, the state rents and repairs A-V equipment. Now moving into microcomputers, the department is developing training materials (including slides, transparencies, and "sample" courseware) on the educational uses of microcomputers.⁷⁶ Regional centers, which are training educators in all 505 school districts, offer hardware and software consulting and microcomputer repair services as well.

***PICA (Printing Industry of the Carolinas) FOUNDATION**, Charlotte, North Carolina. A nonprofit association which, together with Clemson University (see separate entry) and the South Carolina Department of Education, has developed and distributes sound/slide programs for students in industrial arts and graphic communications. Advertises "850 users. Adopted by 4 state education departments."⁷⁷ Listed in *VocEd* magazine's Jan/Feb '82 "Directory of Suppliers." Exhibited at the American Vocational Association's 12/81 and 12/82 conferences. Advertises in *Industrial Education*.

PROJECT LOCAL, Westwood, Massachusetts. A nonprofit regional project for programmed instruction via microcomputers. Offers training, consulting, and centralized purchasing to area school systems, which fund it.

RESEARCH FOR BETTER SCHOOLS, Philadelphia, Pennsylvania. A nonprofit, federally funded project in programmed instruction for basic skills, career devel-

opment, and special education. "Goal is large-scale coordination of new educational procedures, processes, and materials among local districts, intermediate service agencies, and state education departments."⁷⁸

ROBBINSDALE AREA SCHOOLS, Minneapolis, Minnesota. Produces and sells, through commercial distributors, microcomputer courseware in mathematics and language arts for all grade levels. *Newsweek* magazine reports that Robbinsdale has earned about \$30,000 in sales of courseware.⁷⁹

SAGINAW INTERMEDIATE SCHOOL DISTRICT, Regional Educational Media Center, Michigan. Offers A-V equipment repair, a film-lending library, and cooperative purchasing of A-V equipment and supplies to its 15 member school districts.⁸⁰

***STATE FAIR COMMUNITY COLLEGE**, Media Center, Sedalia, Missouri. A district-supported school which produces and sells 240 slide/tape sets and video tapes in vocational education for high school and college students and adults. Subjects include business, auto mechanics, building trades, electronics, and health occupations. Listed in *VocEd* magazine: Jan/Feb '82 "Directory of Suppliers." Advertises in *VocEd*.

SUBURBAN AUDIO VISUAL SERVICE, Burr Ridge, Illinois. Administered by the Suburban Library System, an organization of 74 public libraries, 12 academic libraries, and 19 special libraries in the Chicago suburbs, funded by the state of Illinois. SAVS operates a lending library of 4,000 films and 7,500 records, produces talking-book records and cassettes for the blind and physically handicapped, and offers the following services to member libraries: A-V equipment lending and repair, cooperative purchasing, feature-film rental, and hardware and software consulting.

UNIVERSITY OF TENNESSEE Medical School, Memphis, Tennessee. A state-supported school which produces and distributes "for a nominal charge" on purchaser-supplied video cassette "Someone to Lean On: Your Job as a Support Person" (for husbands and others in the delivery room).⁸¹ Project was state-funded.

***UNIVERSITY OF TEXAS**, Center for Occupational Curriculum Development, Austin, Texas. A state-supported school which produces and sells about 150 vocational education course packages, some of which include transparencies or slide/tape sets. One slide/tape course, visual merchandising, was developed by Sears, Roebuck and Co. and is the only course restricted for "sale to schools only." Other subjects include agriculture, health occupations, home economics, marketing, and industrial education. All Texas public schools receive a 20% discount off the catalog price. Texas residents must add 5% state and local sales taxes to the purchase price. "Complimentary and desk copies are not available since the Center operates on a cost-recovery basis." Catalog, mailed under state indicia, describes center as "a nonprofit, self-sustaining department" of the uni-

versity. "Sales jumped 71% the first year" the Center advertised in the trade press—1970-71. "No public funds are used for advertising. . . . We must rely on sales to keep our Center in operation."⁸² See chart, page 25, for promotional activities.

***UTAH STATE UNIVERSITY FOUNDATION**, Logan, Utah. A nonprofit corporation which sells CHEC—Consumers & Home Economics Careers—available individually as 37 career modules or as a unit for use at the junior high school level. Each module includes audio cassettes. CHEC was developed over a four-year period by the Utah State Board of Education, the Utah State University, and eight Utah school districts. "All revenues will go . . . to cover costs at the . . . Foundation, with whatever is left over channeled back to Utah State University to allow the continuation of research and development activities."⁸³ Sales kit includes "letters of recommendation" from other schools and "sample proposal forms" to be used for obtaining funding to purchase CHEC. Listed in *VocEd* magazine's Jan/Feb '82 "Directory of Suppliers." Exhibited at the American Vocational Association's 12/81 and 12/82 conferences. Advertises in *VocEd*.

Vocational Education Productions—See CALIFORNIA POLYTECHNIC STATE UNIVERSITY.

VOCATIONAL RESEARCH INSTITUTE, Philadelphia, Pennsylvania. A division of the Philadelphia Jewish Employment and Vocational Service (JEVS), a nonprofit, community-supported organization. JEVS was underwritten by the U.S. Department of Labor for more than a decade. Produces and distributes three sets of work samples (including hardware and software) for vocational assessment. The first set, JEVS, named after the organization and designed for special-needs populations, is "now being used in more than six hundred facilities."⁸⁴ The second, VITAS, designed for the disadvantaged, is the product of a three-year Department of Labor contract. The third, VIEWS, is designed for the mentally retarded. Listed in *VocEd* magazine's Jan/Feb '82 "Directory of Suppliers." Exhibited at the American Vocational Association's 12/81 and 12/82 conferences. Advertises in *VocEd*.

Vocational Studies Center—See UNIVERSITY OF WISCONSIN.

WETACOM, Washington, D.C. The taxable business subsidiary of WETA, a public television and radio broadcasting station. Offers "broadcast-quality" video teleconferencing (including program development) for which it draws upon all the resources of the nonprofit parent: "With our own satellite and distribution service (270 public service stations nationally), we have the most economical service available in Washington, D.C. With our own studios, highly trained technical and creative staff and 20 years of broadcast experience, we also think we are the best and most professional service around."⁸⁵

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WGVC-TV, Allendale, Michigan. A public television station, licensed to Grand Valley State Colleges, which sells video production services. See discussion of pages 4 and 6.

UNIVERSITY OF WISCONSIN, Vocational Studies Center, Madison, Wisconsin. A state-supported school which produces and sells, through the center, 50 microcomputer programs, films, and filmstrip/cassette sets for high school and college students and adults in agriculture, career education, special needs, and youth development. Some of the center's materials were produced by the Wisconsin Foundation for Vocational, Technical, and Adult Education, Inc. (see separate entry); some were state- or federally funded. Wisconsin residents are charged a state sales tax. Also offers technical assis-

tance, training, and consulting services to schools, state agencies, and businesses in basic skills and vocational programming, microcomputer applications, curriculum development, career counseling, and other areas. Listed in *VocEd* magazine's Jan/Feb '82 "Directory of Suppliers." Exhibited at the American Vocational Association's 12/81 conference. Advertises in *VocEd*.

WISCONSIN FOUNDATION FOR VOCATIONAL, TECHNICAL, AND ADULT EDUCATION, INC., Madison, Wisconsin. A nonprofit corporation which produces and distributes 2 video courses, each consisting of 30 video tapes, in electricity and marketing for high school and college students. Listed in *VocEd* magazine's Jan/Feb '82 "Directory of Suppliers." Exhibited at the American Vocational Association's 12/81 and 12/82 conferences. Advertises in *Instructional Innovator*.

Many of the above entries include references to two A-V directories:

Video Source Book (Snyset, New York: National Video Clearinghouse, Inc., 1981), 3rd edition, professional volume.

Audiovisual Market Place 1982 A Multimedia Guide (New York, New York: R.R. Bowker Co., 1982), 12th edition.



"Just when did you begin having these anxiety attacks about not paying taxes?"

Subject Indices of Nonprofit Competitors

A. By Type of Activity

The following organizations produce and distribute A-V products (please see index for page numbers):

Agency for Instructional Television
Alameda County Schools
American Association for Vocational Instructional Materials
American College Testing Program
University of Arizona
Association for Continuing Education
Brigham Young University
California Polytechnic State University
Center for Southern Folklore
Clemson University
Close Up Foundation
Clovis Unified School District
Coast Telecourses
Consumers Union
Cornell University
Dallas County Community College District
Dallas Independent School District
Daughters of St. Paul
East Texas State University
Education Development Center, Inc.
Educational Resources Foundation
Great Plains National Instructional Television Library
Harvard University Press
University of Iowa
Maryland Center for Public Broadcasting
Massachusetts Institute of Technology
Miami-Dade Community College
University of Michigan
Michigan State University
University of Mid-America
Mid-America Vocational Curriculum Consortium
Minnesota Educational Computing Consortium
Mississippi Department of Vocational/Technical Education
University of Missouri
Montclair Public School System
Mt. San Jacinto College
National Gallery of Art
National Geographic Society
National Public Radio
Ohio University
Oklahoma Department of Vocational and Technical Education
Pennsylvania Department of Education
PICA Foundation
Research for Better Schools
Robbinsdale Area Schools
State Fair Community College
Suburban Audio Visual Service
University of Tennessee
University of Texas at Austin
Utah State University Foundation
Vocational Research Institute

University of Wisconsin at Madison
Wisconsin Foundation for Vocational, Technical, and Adult Education

The following organizations produce A-V products for others:

University of Arizona
Brigham Young University
Coast Telecourses
University of Colorado
Education Development Center, Inc.
University of Iowa
University of Michigan
University of Mid-America
Mississippi Department of Vocational/Technical Education
National Association of Counties
WETACOM
WGVC-TV

The following organizations distribute A-V products for others:

Aerospace Education Foundation
Agency for Instructional Television
Brigham Young University
University of California
Coast Telecourses
University of Colorado
Conduit
Cornell University
East Texas State University
Educational Resources Foundation
Harvard University Press
Maryland Center for Public Broadcasting
Micro-Ideas
University of Mid-America
University of Missouri
National Council of Churches
PBS Video
Saginaw Intermediate School District

The following organizations offer miscellaneous services:

University of Colorado: A-V facilities and equipment rental
Essex County College: A-V facilities and equipment rental
Illinois Department of Administrative Services: cooperative purchasing of A-V equipment
Micro-Ideas: A-V training and consulting, cooperative purchasing of A-V equipment
Minnesota Educational Computing Consortium: Cooperative purchasing of A-V equipment, A-V consulting
Ohio State University: A-V training and consulting
Oklahoma Department of Vocational and Technical Education: A-V training and consulting

A. By Type of Activity (continued)

Pennsylvania Department of Education: A-V equipment rental and repair, A-V training and consulting
 Project Local: A-V training and consulting, cooperative purchasing of A-V equipment
 Saginaw Intermediate School District: A-V equipment repair, cooperative purchasing of A-V equipment

Suburban Audio Visual Service: A-V equipment rental and repair, cooperative purchasing of A-V equipment, A-V consulting
 University of Wisconsin, Madison: A-V training and consulting

B. By Type of Organization

The following nonprofit competitors are schools, colleges, or universities:

Alameda County Schools
 University of Arizona
 Brigham Young University
 University of California
 California Polytechnic State University
 Clemson University
 Clovis Unified School District
 Coast Community Colleges
 University of Colorado
 Cornell University
 Dallas County Community College District
 Dallas Independent School District
 East Texas State University
 Essex County College
 Harvard University
 University of Iowa
 Massachusetts Institute of Technology
 Miami-Dade Community College
 University of Michigan
 Michigan State University
 Micro-Ideas
 University of Mid-America
 University of Missouri
 Montclair Public School System
 Mt. San Jacinto College
 Ohio University
 Ohio State University
 Robbinsdale Area Schools
 Saginaw Intermediate School District
 State Fair Community College
 University of Tennessee
 University of Texas at Austin
 Utah State University
 University of Wisconsin at Madison

The following organizations are state agencies:

Illinois Department of Administrative Services
 Mississippi Department of Vocational/Technical Education
 Oklahoma Department of Vocational and Technical Education
 Pennsylvania Department of Education

The following are nonprofit corporations or associations:

Aerospace Education Foundation
 Agency for Instructional Television
 American Association for Vocational Instructional Materials
 American College Testing Program
 Association for Continuing Education
 Center for Southern Folklore
 Close Up Foundation
 Conduit
 Consumers Union
 Daughters of St. Paul
 Education Development Center, Inc.
 Educational Resources Foundation
 Great Plains National Instructional Television Library
 Maryland Center for Public Broadcasting
 Mid-America Vocational Curriculum Consortium
 Minnesota Educational Computing Consortium
 National Association of Counties
 National Council of Churches
 National Gallery of Art
 National Geographic Society
 National Public Radio
 PBS Video
 PICA Foundation
 Project Local
 Research for Better Schools
 Suburban Audio Visual Service
 Vocational Research Institute
 WETACOM (taxable business subsidiary of nonprofit parent)
 WGVC-TV
 Wisconsin Foundation for Vocational, Technical, and Adult Education

C. By Type of Funding

Only those organizations for which funding information was available are listed here. The funding source indicated (local, state, federal) may apply either to the organization as a whole or to specific A-V products or projects. For greater detail, consult the individual entry for that organization (see index for page numbers). In no case should the funding source indicated be interpreted as an organization's sole source. Most nonprofits receive contributions from a wide variety of sources, both public and private. In addition, as noted in several entries above, sale of A-V products represents a major funding source for some. For practical purposes, it is impossible to trace an organization's public funding through its budget allocation process to its A-V efforts. Such a connection is clear-cut only when specific A-V products or projects are required by government grants or contracts.

The following organizations receive local funding:

Alameda County Schools
Clovis Unified School District
Coast Community Colleges
Dallas County Community College District
Dallas Independent School District
Essex County College
Miami-Dade Community College
Montclair Public Schools
Mt. San Jacinto College
Project Local
Robbinsdale Area Schools
Saginaw Intermediate School District
State Fair Community College
Utah State University Foundation
Vocational Research Institute
WGVC-TV

The following organizations receive state funding:

Agency for Instructional Television
American Association for Vocational Instructional Materials
University of Arizona
University of California
Clemson University
University of Colorado
East Texas State University
Educational Resources Foundation

Great Plains National Instructional Television Library
Illinois Department of Administrative Services
University of Iowa
Miami-Dade Community College
University of Michigan
Michigan State University
Micro-Ideas
University of Mid-America
Mid-America Vocational Curriculum Consortium
Minnesota Educational Computing Consortium
Mississippi Department of Vocational/Technical Education
University of Missouri
Ohio University
Ohio State University
Oklahoma Department of Vocational and Technical Education
Pennsylvania Department of Education
PICA Foundation
Suburban Audio Visual Service
University of Tennessee
University of Texas at Austin
Utah State University Foundation
University of Wisconsin at Madison
WGVC-TV

The following organizations receive federal funding:

Aerospace Education Foundation
California Polytechnic State University
Center for Southern Folklore
Close Up Foundation
Conduit
Education Development Center, Inc.
Educational Resources Foundation
Maryland Center for Public Broadcasting
Micro-Ideas
University of Mid-America
National Public Radio
Ohio State University
Research for Better Schools
Vocational Research Institute
University of Wisconsin at Madison
WGVC-TV

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D. By Geographic Region

Northeast (Maine, New Hampshire, Vermont, Massachusetts, Connecticut, Rhode Island, and New York):
 Consumers Union
 Cornell University
 Daughters of St. Paul
 Education Development Center, Inc.
 Harvard University Press
 Massachusetts Institute of Technology
 National Council of Churches
 Project Local

Mid-Atlantic (Pennsylvania, New Jersey, Virginia, West Virginia, Delaware, Maryland, and Washington, D.C.):
 Aerospace Education Foundation
 Close Up Foundation
 Essex County College
 Maryland Center for Public Broadcasting
 Montclair Public School System
 National Association of Counties
 National Gallery of Art
 National Geographic Society
 National Public Radio
 PBS Video
 Pennsylvania Department of Education
 Research for Better Schools
 Vocational Research Institute
 WETACOM

Southeast (Kentucky, Tennessee, North Carolina, South Carolina, Georgia, Alabama, Mississippi, and Florida):
 American Association for Vocational Instructional Materials
 Center for Southern Folklore
 Clemson University
 Educational Resources Foundation
 Miami-Dade Community College
 Mississippi Department of Vocational/Technical Education
 PICA Foundation
 University of Tennessee

East Central (Wisconsin, Michigan, Illinois, Indiana, Ohio):
 Agency for Instructional Television
 Illinois Department of Administrative Services
 University of Michigan
 Michigan State University

East Central (continued)

Micro-Ideas
 Ohio University
 Ohio State University
 Saginaw Intermediate School District
 Suburban Audio Visual Service
 University of Wisconsin at Madison
 Wisconsin Foundation for Vocational, Technical, and Adult Education
 WGVC-TV

Midwest (North Dakota, South Dakota, Minnesota, Iowa, Nebraska, Kansas, Missouri, Arkansas, Oklahoma, Texas, and Louisiana):
 American College Testing Program
 Conduit
 Dallas County Community College District
 Dallas Independent School District
 East Texas State University
 Great Plains National Instructional Television Library
 University of Iowa
 University of Mid-America
 Mid-America Vocational Curriculum Consortium
 Minnesota Educational Computing Consortium
 University of Missouri
 Oklahoma Department of Vocational and Technical Education
 Robbinsdale Area Schools
 State Fair Community College
 University of Texas at Austin

Mountain (Montana, Idaho, Wyoming, Utah, Colorado, New Mexico, Arizona, and Nevada):
 University of Arizona
 Brigham Young University
 University of Colorado
 Utah State University Foundation

Pacific (Washington, Oregon, California, Alaska, and Hawaii):
 Alameda County Schools
 Association for Continuing Education
 University of California
 California Polytechnic State University
 Clovis Unified School District
 Coast Telecourses
 Mt. San Jacinto College

PROMOTIONAL ACTIVITIES OF SELECTED NONPROFIT COMPETITORS

Organization	Activity	Listed in Audiovisual Market Place*	Listed in Video Source Book*	Exhibited at 12/81 AVA conference	Exhibited at '82 AECT conference	Listed in 5/81 II "Directory of Suppliers"	Listed in 11/81 EITV "Directory of Program Sources"	Listed in 12/81 IndEd "Annual Buying Directory"	Listed in Jan/Feb '82 VocEd "Directory of Suppliers"	Advertises in Trade Press	Sales Catalog Available
Agency for Instructional Television		•	•		•	•	•		•		•
Center for Southern Folklore		•	•		•	•	•				•
Coast Telecourses		•	•		•	•	•			•	•
University of Colorado		•	•		•		•				•
Educational Development Center, Inc.		•	•			•	•				•
Educational Resources Foundation			•	•			•		•	•	•
Maryland Center for Public Broadcasting			•		•	•	•				•
University of Mid-America		•	•		•	•	•				•
National Geographic Society		•	•		•	•	•			•	•
PBS Video		•	•		•	•	•				•
University of Texas at Austin		•						•	•	•	•

Key

AVA: American Vocational Association

AECT: Association for Educational Communications & Technology

II: Instructional Innovator magazine

EITV: EITV magazine

VocEd: VocEd magazine

IndEd: Industrial Education magazine

*See page 20 for citations.

VI.

NOTES

¹Copy of statement delivered at "Government Competition with Small Business," a hearing convened by the Small Business Administration's Office of the Chief Counsel for Advocacy in Des Moines, Iowa, on Aug. 28, 1979.

²Government Competition: A Threat to Small Business, Report of the SBA Advocacy Task Group, U.S. Small Business Administration (Washington, D.C.: 1980).

³Copy of statement delivered at the Joint Economic Committee hearing, "The Impact of Government Competition on Small Business," in Washington, D.C., on Oct. 28, 1981, p. 5.

⁴Copy of statement delivered at the hearing of the U.S. Senate Committee on Governmental Affairs, Subcommittee on Federal Expenditures, Research, and Rules, "Unfair Competition," in Washington, D.C. on May 19, 1982.

⁵The Effects of Domestic Policies of the Federal Government upon Innovation by Small Businesses, a report of the small-business members who served on the industrial innovation advisory committee that was established as part of the domestic review (Washington, D.C.: 1979), p. 21.

⁶Small Business & Innovation, A Report of an SBA Office of Advocacy Task Force, U.S. Small Business Administration (Washington, D.C.: 1979), p. 13.

⁷America's Small Business Economy, Agenda for Action, White House Commission on Small Business (Washington, D.C.: 1980), p. 71.

⁸Government Competition with Small Business, hearings before the Subcommittee on Advocacy and the Future of Small Business of the Committee on Small Business, U.S. Senate, 96th Cong., 1st Sess., Washington, D.C. and Los Angeles, California, 1981.

⁹William Galt, "Facing U.S. Cuts, Municipalities Try New Ways to Raise School Funds," New York Times, June 12, 1981, front page.

¹⁰Dial Wins at FCC; More Battles Pending," Current (NASB newsletter), Dec. 22, 1980, p. 4.

¹¹Tracy D. Connors, editor, *The Nonprofit Organization Handbook* (New York: McGraw-Hill Book Company, 1980), p. 1-3.

¹²Marc Lane, *Legal Handbook for Nonprofit Organizations* (New York: AMACOM, 1980), p. 1.

¹³*Id.*, pp. 211-212.

¹⁴*Id.*, p. 214.

¹⁵*Id.*, p. 155.

¹⁶Andrea Pedolsky, editor, *In-House Training and Development Programs* (Detroit, Michigan: Neal-Schuman Publishers, Inc., 1981), p. 268.

¹⁷direct mail materials

¹⁸Articles in *The Grand Rapids Press*: "CVSC Reports \$445,118 Given for Educational TV," April 1, 1971; "TV Station Heads Out," June 28, 1976; "Shortage of Local Programming Is a Sizeable Problem at Channel 35," April 22, 1979; "Federal Grant to Help TV35 Buy Minicams," Sept. 27, 1979.

¹⁹PBS in Focus in West Michigan," *West Michigan*, June 1981, p. 38.

²⁰Toni Morris, "Cuts May Tune In Viewers to Needs of Public TV," *The Grand Rapids Press*, March 10, 1981, p. 7C.

²¹Appears in *Instructional Innovator*, Feb. 1982, pp. 10-12.

²²Dan Brook, "Providing for Exchange of Software," *Industrial Arts Insider*, Jan/Feb 1982.

²³Gerald Gleason, "Microcomputers in Education: The State of the Art," *Educational Technology*, March 1981, pp. 7-18; see especially pp. 11-12.

²⁴Appears in *Educational Technology*, April 1982, p. 49.

²⁵Gleason, *op. cit.*, p. 12.

²⁶Lane, *op. cit.*, p. 273.

²⁷Schultz's statement is referenced in note 1.

²⁸"Shortage of Local Programming Is a Sizeable Problem at Channel 35," *The Grand Rapids Press*, April 22, 1979.

²⁹Decker's article is referenced in note 21.

³⁰Meeli's testimony was given at the hearing referenced in note 8.

³¹Q and A, with data tables, prepared by Thomas Hope for William Stephens, Esq.

³²A summary of Parlati's research appears in *Instructional Innovator*, May 1981, pp. 20-21.

³³Thomas Hope, "in the Matter of Money," *Instructional Innovator*, May 1981, p. 11.

¹⁰Schultz's statement is referenced in note 1.

¹¹Kevin Dayton, "Elaborate UA recording studio expenses high," *Arizona Daily Wildcat*, Oct. 3, 1980, p. 7.

¹²Nathan Shelton, "UA to end commercial use of recording studio," *Arizona Daily Wildcat*, Feb. 17, 1981.

¹³Edward Lempinen, "UA studio competes; private firms cry foul," *Arizona Daily Star*, Feb. 1, 1981, front page.

¹⁴*Id.*

¹⁵Letter dated Jan. 8, 1981.

¹⁶Lempinen, *loc. cit.*

¹⁷Circular No. A-76, Revised, Transmittal Memorandum No. 4, Executive Office of the President, Office of Management and Budget, to the Heads of Executive Departments and Establishments, March 29, 1979, p. 1.

¹⁸*Id.*, p. 2.

¹⁹General Accounting Office, *Civil Servants and Contract Employees: Who Should Do What for the Federal Government?* (Washington, D.C., June 15, 1981), FPCD 81-43, p. iv.

²⁰Hearings referenced in note 8.

²¹51 Stat. 93, 97th Cong., 1st Sess. (1981).

²²5, 2278, 97th Cong., 2d Sess. (1982).

²³Statement on behalf of NAVA, Kenton Pattie, Senior Staff Vice President, NAVA, given at the hearing referenced in note 4.

²⁴Lane, *op. cit.*, chapter seven.

²⁵96 Cong. Rec. 13273 (1998), remarks of Senator George.

²⁶Connors, *op. cit.*, p. 1-73.

²⁷Lane, *op. cit.*, p. 171.

²⁸Gent, *loc. cit.*

²⁹Letter to the editor, *New York Times Book Review*, Aug. 1, 1982, p. 4.

³⁰Edwin McDowell, "Academic Publishing: Tortuous Process," *New York Times Book Review*, Oct. 19, 1980, p. 12.

³¹news item, *Instructional Innovator*, May 1982, p. 30.

³²*Encyclopedia of Associations* (Detroit, Michigan: Gale Research Company, 1981), 16th edition, p. 588.

³³Correspondence, July 17, 1979, from James Jensen, California State University to Charles Bergwall, Bergwall Productions, Inc.

³⁴news item, *Educational Technology*, March 1982, p. 6.

³⁵1981 Annual Report, p. 23.

³⁶news item, *T.H.E. Journal*, Jan. 1982.

³⁷sales catalog

³⁸sales catalog

³⁹news item, *Coast Community College newsletter*, Spring 1981, p. 2.

⁴⁰sales catalog

⁴¹sales catalog

⁴²advertisement in *Back Stage*, March 19, 1982.

⁴³"Nonprofit Foundation and Profitable Real Estate Make Millions for Dallas Schools," *American School Board Journal*, Aug. 1979, p. 21; "Dallas's Nonprofit Foundation Founders," *American School Board Journal*, Nov. 1979, p. 39.

⁴⁴Correspondence with Bon Bagby, Chief Counsel, Illinois Department of Administrative Services, May 1982.

⁴⁵sales catalog

⁴⁶Jenna Williams and Tracey Robinson, "Minnesota Leads the Way," *Newsweek*, Nov. 22, 1982, p. 116.

⁴⁷For examples, see the April 1982 *The School Administrator* (p. 14), the Feb. 1982 *Instructional Innovator* (p. 36), and the April 1982 *VocEd* (p. 43).

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⁷²news item, *Instructional Innovator*, April 1982, p. 4.

⁷³NAC news release, March 1982.

⁷⁴direct mail materials

⁷⁵Dale Cotton, "Oklahoma's Productivity Division," *VocEd*, May 1982.

⁷⁶Gary Heighs, "Pennsylvania's Statewide Initiative," *Instructional Innovator*, Sept. 1981, pp. 26-27.

⁷⁷advertisement, inside front cover of *Industrial Education*, Oct. 1981.

⁷⁸*Encyclopedia of Associations* (Detroit, Michigan: Gale Research Company, 1981), 16th edition, p. 552.

⁷⁹Williams and Robinson, loc. cit.

⁸⁰leaflet, "Saving Your Tax Dollars," Saginaw Intermediate School District.

⁸¹Debbie Bulger, "How to Support a Pregnant Woman in Less than 25 Minutes," *Instructional Innovator*, Jan. 1982, pp. 26-27.

⁸²American Vocational Journal promotional materials

⁸³news item, *Curriculum Product Review*, May 1980, p. 25.

⁸⁴direct mail materials

⁸⁵direct mail materials

VII.**EXHIBITS**

This section contains 9 examples of advertisements placed by nonprofit competitors (see individual entries in Section V) in the trade press. Copies were made from the following publications:

Advertiser	Publication
California Polytechnic State University	June/82 VocEd
Coast Telecourses	Apr/82 <i>Instructional Innovator</i>
Educational Resources Foundation	Jan/Feb 82 VocEd
National Geographic Society	Jan/82 <i>Instructional Innovator</i>
Oklahoma Dept. of Vocational and Technical Education	June/82 VocEd
PICA Foundation	Oct/81 <i>Industrial Education</i>
State Fair Community College	June/82 VocEd
University of Texas at Austin	May/June 82 <i>Industrial Education</i>
Utah State University Foundation	Apr/82 VocEd

For over 30 years,

instructors have welcomed VEP teaching materials into their classrooms. Today, innovative teachers continue to choose VEP materials for the best values in Vo-Ag teaching aids.

Your Students Still Deserve The Best

Your new 1989 catalog offers over 800 items to make teaching easier and more effective. Just look at these great features:

- over 35 new products
- an expanded format for easier reading
- a wide variety of award-winning materials – everything from animal science to shop safety
- and a TOLL FREE number for time-saving phone orders.

And of course, VEP still offers a no-risk, money-back guarantee on all orders.



Just call
1-800-235-4146
TOLL FREE
for your free 1989 VEP catalog today!

VEP
**Vocational
Education
Productions**
California Polytechnic State Univ.
San Luis Obispo, California 949

CALIFORNIA POLYTECHNIC STATE UNIVERSITY'S Vocational Education Productions service operates through a university nonprofit corporation. (See page 14 for a complete description of the university's activities.)

Reprinted with permission from the American Vocational Association

**IF YOU DON'T KNOW COAST
YOU DON'T KNOW EDUCATION**



1. Coast Telecourses offers more adult level instructional learning systems than any other producer/distributor in North America.
2. Coast Telecourses are used at more than 1000 locations throughout North America.
3. Coast Telecourses are available in 1/2", 3/4", or 2" formats for use in schools, colleges, universities, libraries, industry education, cable television, broadcast television, military programs and instructional facilities.
4. Coast Telecourses are shown on PBS and commercial stations and hundreds of cable television systems. Contact us for our catalog and leave purchase information.

Chip Harris—Coast Telecourses (714) 962-8861
10231 Slater Avenue, Fountain Valley, California 92708

INQUIRY CARD NO. 121

In addition to selling nationwide, COAST TELECOURSES offers production services in competition with for-profit production companies. (See page 15 for a complete description of their activities.)

**National Geographic's
New 1982 Catalog! FREE!**



- 66 new products
- Over 500 filmstrips, films, videos, multimedia, kits, books, maps
- Lively, classroom-tested instruction in science, social studies, technology, careers, health, and other curriculum areas.

**WRITE FOR YOUR
COPY TODAY**

☐ NATIONAL GEOGRAPHIC
EDUCATIONAL SERVICES
Washington, D.C. 20036

INQUIRY CARD NO. 130

The NATIONAL GEOGRAPHIC SOCIETY, a nonprofit organization, is a major seller of A-V software. Most materials are unrelated to the Society's research and expeditions. (See page 18 for a complete description of the Society's activities.)

Looking for competency-based instructional materials?

Special Programs
 Agriculture
 Cooperative Education
 Distributive Education
 Health
 Home Economics
 Trade and Industrial



**Send for our
 FREE catalog today!**

State Department of Vocational
 and Technical Education
 Curriculum and Instructional
 Materials Center
 1515 W. 6th Avenue
 Stillwater, OK 74074
 (405)377-2000

Circle No. 9 on Answer Express Card

The OKLAHOMA DEPARTMENT OF VOCATIONAL AND TECHNICAL EDUCATION sells 150 vocational education "packages." This was designed to generate out-of-state sales. (See page 18 for a complete description of their activities.)

Reprinted with permission from the American Vocational Association

PICA
FOUNDATION

in cooperation with
Clemson University
N.C. Dept. of Education

Graphic Communications Education Program

Give your students the kind of training
which graphics arts employers prefer.

The PICA-Clemson self-instructional sound-slide
programs cover everything from an orientation
to graphic communications through design,
layout, paste-up, photography,
phototypesetting, and on to dozens of major
printing techniques, paper calculations,
finishing and binding. Related learning activities

packages give students practical, hands-on
experience using these new skills step by step. An
1100-page curriculum guide aids the teacher in
many ways.



850 users. Adopted by 4 state
education departments.
Recommendations are numerous.
Inquire now!

For information, contact:

PICA
FOUNDATION

101 Hawthorne Lane
P.O. Box 4487
Charlotte, N.C. 28204
704 334-6444

For-profit companies offer industrial arts A-V materials
like these advertised by the PICA Foundation. (See
page 18 for a complete description of the Foundation's
activities.)

Ahhh...

the sweet taste of success

Everyone wants to taste it, feel it, experience it. We at Educational Resources Foundation have developed a training program to help everyone be able to taste the success of getting and keeping a job. It's called *Making It Work*.

Making It Work is an 18 module set of videotapes with leader and student materials, aimed at the young adults and adults about to enter the job market. It portrays and reinforces the skills necessary to seeking and maintaining a job.

Help your students be prepared to taste the success.

For more information, or a free preview pack, call us toll free at 1-800-845-8822.

Educational Resources Foundation
P.O. Drawer L, Columbia, S.C. 29250
A non-profit educational organization



This "non-profit educational organization" is actually the SOUTH CAROLINA EDUCATIONAL RESOURCES FOUNDATION. (See page 16 for a complete description of the Foundation's activities.)

Reprinted with permission from the American Vocational Association

**competency
based
instructional
modules**

OCCUPATIONAL AREAS:

•Auto Mechanics •Building Trades
•Business & Office •Dental Assisting
•Energy •Health Occupations •Welding
•Pre-Employment •Sex Equity •Electronics

MATERIALS INCLUDE:

Slide/tape or Videotape • Student Learning
Guide • Instructor Guide

FIELD TESTED in vocational education
programs with secondary, post-secondary,
Juli, disadvantaged, and handicapped
students

For free catalog, write to:



THE MEDIA CENTER State Fair Community College
1900 Riverdon Road, Seneca, MO 65301 (816) 828-1100

Circle No. 13 on Answer Line Press Card

STATE FAIR COMMUNITY COLLEGE sells 240 slide/tape sets and video tapes. They compete for sales in areas served by for-profit companies, such as auto mechanics, electronics, and health. (See page 19 for a complete description of this school's A-V and video services.)

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Texas News

VOL. 2, NUMBER 1

AUSTIN, TEXAS

1981-82

Working Professionals Testify to OCD's "Competitive Edge."



(AUSTIN) Center for Occupational Curriculum Development (OCD) officials are citing recent findings as proof that their student-oriented career publications are popular with working professionals as well.

"Our Elements of Work Simplification is now required reading in institutions ranging from the U.S. Navy to General Electric to the Virginia National Bank," announced OCD Director Dr. Jack Robertson. "That's not an isolated example, either. A grocery store chain in New Zealand uses our publications to train new employees, and over 90% of our jewelry publications are purchased by professional jewelers for use as teaching tools and reference guides."

"We've always maintained that our publications give students a competitive edge," Robertson continued. "Now working professionals are saying it for us."

OCD, widely noted for its self-paced IE and M&DE curricula, has recently added several new career categories to its extensive list of publications. All are reportedly compe-

tency-based, thoroughly researched, exhaustively tested, and conclusively validated.

OCD Introduces New Curriculum Areas/Titles

(AUSTIN) Allied Health Occupations, Industrial Arts, and Post-Secondary curriculum categories have been added to the OCD's already-impressive lineup for the new school year.

Specific new career titles were displayed in virtually every category as OCD officials recently unveiled their new, large-format catalog, said to be the most comprehensive ever offered by the noted publisher. Instructors were urged to write directly to OCD for a copy.



Center for Occupational Curriculum Development
The University of Texas
P.O. Box 7218
Austin, TX 78712
512-471-7716

The University of Texas at Austin is an equal opportunity institution.

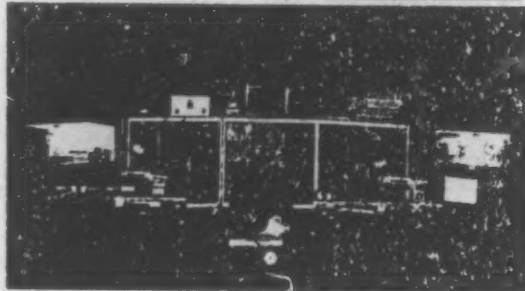
Circle No. 147 on Reader Inquiry Card

"We must rely on sales to keep our Center in operation," says the UNIVERSITY OF TEXAS at Austin. (See page 19 for a complete description of the university's activities.)

Consumer & Home Economics Careers **C.H.E.C.**

90 CAREER TITLES

01. Building Maintenance Worker
 02. Caterer
 03. Child Care Aide
 04. Clothes Designer
 05. Consumer Consultant
 06. Consumer and Home Economics Teacher (12 people)
 07. Consumer Information Specialist
 08. Cosmetologist
 09. Craft Director
 10. Custom Clothing and Alterations Person
 11. Decorator's Assistant
 12. Designer
 13. Dry Cleaner
 14. Executive Housekeeper
 15. Extension Home Economist
 16. Fabric Designing (Printer)
 17. Fabric Manufacturing (Weaver)
 18. Fashion Consultant (12 people)
 19. Floral Designer
 20. Food Processing Technician
 21. Health and Welfare Home Economist
 22. Home Economist in Business Kitchen Planner
 23. Home Economist in Journalism and Advertising
 24. Home Health Aide (12 people)
 25. Home Service Director
 26. Homemaker
 27. Homemaker's Aide
 28. Industrial Sewing Machine Operator 1
 29. Industrial Sewing Machine Operator 2
 30. Interior Decorator
 31. Marketing Research Worker
 32. Merchandiser
 33. Pattern Maker
 34. Personal Finance Advisor
 35. Sewing Machine Repair Person
 36. Short Order Cook
 37. Textile Technician
- Vocational Careers**
 * Included in the 90 careers recommended from specific areas of home economics to service 24 students
 * Management is an integral part of each unit



**Hands-on, Activity—
Centered Program
Exploration Activities**

**Portable
Variable Priced Packages
Audio Supported Texts**



Developed by the
UTAH STATE BOARD FOR VOCATIONAL EDUCATION
 And marketed by the
UTAH STATE UNIVERSITY FOUNDATION
 For more information contact
UTAH STATE UNIVERSITY FOUNDATION
 USU UMC 93, Logan, Utah 84322
 Call collect (801) 753-7340 in Utah
 Toll free (800) 453-2882 (24 hr.)



Will Be Exhibiting At AVA And AHEA in 1992
 Circle No. 3 on Answer Express Card

UTAH STATE UNIVERSITY FOUNDATION advertises that "all revenues will go . . . to cover costs . . . with whatever is leftover channeled back to Utah State University . . ." (See page 19 for a complete description of the Foundation's activities.)

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VIII.**Nonprofit Competitors**
(coded by unfair activity)**Key to Unfair Activity Codes on Pages 31 and 32**

Code	Unfair Activity
A	distributes products similar to, or duplicative of, those already available from commercial firms
B	distributes local/state/federally funded products similar to, or duplicative of, those already available from commercial firms
C	produces and distributes products similar to, or duplicative of, those already available from commercial firms
D	produces and distributes local/state/federally funded products similar to, or duplicative of, those already available from commercial firms
E	local/state/federally funded distribution of products similar to, or duplicative of, those already available from commercial firms
F	offers production services already available from commercial firms
G	offers training, consulting services already available from commercial firms
H	offers cooperative purchasing of A-V materials, equipment
I	offers equipment rental, repair services already available from commercial firms
J	unique, nonprofit product should be distributed through commercial firms which specialize in distributing such products, thereby bringing the product back into the tax base

Index of Nonprofit Competitors (coded in left column by unfair activity)

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B - Aerospace Education Foundation	13, 21, 22, 23
B,D - Agency for Instructional Television	13, 14, 21, 22, 24, 25
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D - American Association for Vocational Instructional Materials	14, 21, 22, 23, 24
C - American College Testing Program	14, 21, 22, 24
D,F - University of Arizona	10, 14, 21, 22, 23, 24
C - Association for Continuing Education	14, 21, 22, 24
C,F - Brigham Young University	14, 21, 22, 24
E - University of California	14, 21, 22, 23, 24
D - California Polytechnic State University	12, 14, 21, 22, 23, 24, 29
D - Center for Southern Folklore	14, 21, 22, 23, 24, 25
D - Clemson University	8, 14, 21, 22, 23, 24
D - Close Up Foundation	14, 21, 22, 23, 24
D - Clovis Unified School District	14, 21, 22, 23, 24
D,F - Coast Telecourses: The Coast Community Colleges	15, 21, 22, 23, 24, 25, 29
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E - Conduit	15, 21, 22, 23, 24
C,J - Consumers Union	9, 15, 21, 22, 24
A,B,C - Cornell University	6, 15, 21, 22, 24
D - Dallas County Community College District	15, 21, 22, 23, 24
D - Dallas Independent School District	15, 21, 22, 23, 24
C,J - Daughters of St. Paul	15, 21, 22, 24
B,D - East Texas State University	15, 21, 22, 23, 24
A,D,F - Education Development Center, Inc.	4, 15, 21, 22, 23, 24, 25
D - Educational Resources Foundation	12, 16, 21, 22, 23, 24, 25, 29
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STATEMENT OF
RALPH ENGEL, PRESIDENT
CHEMICAL SPECIALTIES MANUFACTURERS ASSOCIATION
TO THE
SENATE COMMITTEE ON SMALL BUSINESS
FEBRUARY 25, 1983

I appreciate the opportunity to present the concerns of the Chemical Specialties Manufacturers Association (CSMA) for the Small Business Committee's consideration in setting its agenda and oversight activities in the 98th Congress. It is unfortunate that I was unable to be present for your committee's hearing on February 25, but on behalf of CSMA, I want to commend the committee for its interest in and concern about small businesses across the country.

CSMA is a voluntary, nonprofit membership association composed of nearly 400 companies engaged in the manufacture, distribution, and marketing of chemical specialty products, such as aerosols, home and garden insecticides, disinfectants and sanitizers, detergents and cleaning compounds, automotive chemicals, and waxes, polishes and floor finishes.

I would like to respectfully urge the Senate Small Business Committee to initiate a complete examination of the problems small businesses face in complying with environmental statutes and regulations, as part of its legislative and oversight agenda. The implementation of these statutes and the promulgation of these regulations will continue to have a significantly disproportionate impact on small businesses, especially the small chemical manufacturer.

During the 98th Congress, several fundamental environmental statutes--Clean Water Act, Clean Air Act, Resource Conservation and Recovery Act, Federal Insecticide, Fungicide and Rodenticide Act, and the Toxic Substances Control Act--are all coming up for review and reauthorization, and each of these statutes will have an impact on small business. In addition, the Environmental Protection Agency (EPA) will propose or promulgate a series of regulations that will directly impact small businesses. We at CSMA believe that the Senate Small Business Committee ought to examine these legislative and regulatory initiatives that are anticipated for the 98th Congress. We also believe that the Committee ought to examine the methods and means to minimize administrative burdens and to increase the understanding of the problems that small businesses have in complying with environmental statutes and regulations.

Although several other congressional committees will be examining these environmental laws in the 98th Congress, the Small Business Committee is uniquely qualified to investigate these laws from the perspective of small business interests. Other committees often neglect the interests or concerns of small companies or do not adjust legislation to account for the differences in ability to comply between large and small firms.

CSMA believes that the Small Business Committee should make a comprehensive evaluation of the small business problems associated with each of these five environmental statutes. Too frequently, other committees have taken a piecemeal approach to these laws. It is important to evaluate the entire statute and develop a systematic policy for reducing these problems consistent with providing adequate protection for human health and the environment.

We believe that this Committee can help eliminate the inconsistent, unnecessary and burdensome requirements for small businesses by insuring consideration of small business interests initially, rather than as an after-thought. We would like to comment briefly on the Regulatory Flexibility Act and these environmental statutes.

REGULATORY FLEXIBILITY ACT

As a committee intimately involved with passage of the Regulatory Flexibility Act (RFA) in 1980, the Small Business Committee is aware of the disproportionate impact that federal regulations have on small businesses, which have long and often been unfairly required to shoulder the same burdens as their larger competitors. The RFA has effectively forced agencies to examine the impact which a proposal or final rule will have on small businesses. The action has already resulted in improved rulemaking. We are concerned, however, that in some instances the RFA is being shortcircuited by hasty resort to Section 6(b), which permits agencies to dispense with initial and final regulatory flexibility analyses in instances where "the head of the agency certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities." It appears that in some instances certification by the agency head is based on incomplete or erroneous data.

We recommend that amended legislation mandate every agency to fully evaluate the potential impacts on small businesses under section 6(b) of the Regulatory Flexibility Act. We further recommend that federal agencies be required to conduct accurate economic analyses in examining the impact of regulation on small businesses. Agencies should also be reminded that Congress did not intend

section 6(b) of the Act to be a loophole for avoiding responsibility for their obligation to prepare initial and final regulatory analyses of small businesses.

We urge the committee to look into suitable approaches which agencies can take to develop adequate data for regulatory impact analyses for environmental regulations. Certainly, increased cooperation and communication with the Small Business Administration, which has a very extensive data base on small businesses, would be an advantageous starting point.

We would respectfully urge the committee to fully investigate the use of RFA's section 6(b) and its impact on small businesses.

CLEAN WATER ACT

EPA's recent proposal covering effluent limitations guidelines for pesticides under the Clean Water Act is an example of an agency's failure to appreciate realistically the economic impact on small businesses due to unfounded assumptions built into the supporting documents. The proposal states that 90 percent of all formulators and packagers are achieving zero wastewater discharge and therefore, the proposed zero discharge level would not have a significant impact on a substantial number of small entities.

EPA arrived at the figure of 90 percent compliance through phone inquiries to producers of specific agricultural chemicals who were asked if they formulate and package. Those falling into this category were then asked about their discharge levels. This survey method was not random and failed to account for biases in any statistically sound way. More importantly, it did not consider the nonagricultural sector of the pesticide industry (i.e., home, lawn

and garden use) which is comprised of a far greater number of small formulators and packagers than the agricultural pesticide sector.

By basing the economic analysis on manufacturers of pesticides, EPA also failed to recognize that mixing tanks and other equipment used in the formulation and packaging processes of small companies are frequently used for more than one product line. Formulation of pesticides may only be 5 percent of the business of a small formulator involved in detergents, waxes and other products. Installation of the necessary controls on mixing equipment to meet a zero discharge level for pesticides (assuming that is even technologically feasible) for this typical small formulator would mean that discharges from the operations involving the other 95 percent of his business (nonpesticidal) would be meeting the pesticide effluent limitation, unnecessarily and at great expense.

The proposal was also worded so that the zero discharge level applied to all pesticides, even though manufacturers are required to meet discharge levels under the Clean Water Act for only a portion of pesticides. In comments to the Agency, CSMA urged that EPA limit the pesticides regulated for formulators and packagers to only those regulated for manufacturers and develop a reliable data base on the formulation and packaging of remaining pesticides so that EPA can move forward with a rule that regulates formulators and packagers no more stringently than manufacturers.

Economic analyses of agencies which fail to account for such subtle but crucial distinctions as the difference between agricultural and nonagricultural pesticides or the small business necessity of using equipment for several functions, may indicate

that the proposed rule will not have a substantial impact on small businesses when actually it could result in shutting down product lines or many small businesses entirely.

The Association intends to continue working with the Agency to assure that the rulemaking proceeds on a sound data base. We would respectfully urge the Small Business Committee to fully examine the Clean Water Act and its implications for small businesses.

CLEAN AIR ACT

An example of an attempt by some members of Congress to regulate by legislation without adequate consideration of the impact on small business is the effort to automatically designate 37 substances as "hazardous pollutants" under the Clear Air Act.

Under present law, Section 112 of the CAA authorizes the EPA administrator to list and establish emission standards for hazardous air pollutants, which are defined as those pollutants which in the administrator's judgment "cause or contribute to air pollution and which may reasonably be anticipated to result in an increase in mortality or an increase in serious irreversible or incapacitating reversible illness." Because listing of a chemical substance as a hazardous pollutant triggers imposition of stringent and extremely expensive controls, it is crucial that such decisions be based on complete, accurate and adequately reviewed scientific data. The legislative proposal would require the administrator to complete studies of 37 chemicals within designated time periods. Failure by the administrator to complete the studies or specify that the substances are not hazardous pollutants will automatically result in designation of the substances as "hazardous pollutants."

Again, small businesses would bear the disproportionate brunt of employing expensive pollution controls on many of the 37 substances for which the need for pollution controls has not been demonstrated by reliable scientific data.

It is our view that having developed statutory language which directs agencies to implement certain environmental policies and goals, Congress should generally defer to the agencies' expertise in achieving those goals. The administrative process, with notice and comment rulemaking which enables detailed comment by industry and the public on specific issues, is the appropriate forum for development of regulations which protect the public without imposing unreasonable and unnecessary costs on industry. The administrative process also triggers operation of the RFA, which ensures that the regulatory impact on small businesses will be evaluated and reduced in many instances.

We would respectfully urge the Small Business Committee to investigate the impact that the Clean Air Act has on small businesses.

RESOURCE CONSERVATION AND RECOVERY ACT

Many small companies have facilities which are currently exempt from the manifesting and recordkeeping requirements under the Resource Conservation and Recovery Act (RCRA). The Environmental Protection Agency (EPA) administratively ruled in 1980 that facilities generating less than 1,000 kg. per month of hazardous waste are not regulated. Any change in this cut-off level would require some additional regulation of facilities which lose their exempt status.

Congress attempted to reauthorize RCRA in 1982. On September 8, 1982, the House of Representatives passed a RCRA reauthorization bill by a 317 to 32 vote. The most controversial issue centered on the treatment of small generators of hazardous waste. Currently, facilities which generate less than 1,000 kg. of hazardous waste per month are exempt from the "cradle-to-grave" monitoring system established under RCRA. Legislators have advocated reduction of the cut-off level to bring more hazardous waste under regulation, or an outright elimination of the exemption, regardless of the increased regulatory burden on small generators of waste. As reported from Committee, the House bill included an amendment which would reduce the exemption to apply only to generators of 100 kg. or less per month of waste. Congressman Phil Gramm of Texas attempted to delete the provision on the House floor but lost on a vote of 183 to 148.

On the Senate side, the Senate Environment and Public Works subcommittee on Environmental Pollution, chaired by Senator John Chafee, reported a bill on September 28th. The subcommittee bill made no change in the existing small quantity generators exemption but called for a two-year study of the issue. The full Committee did not take up this legislation during the lame duck session. Both Senator Chafee and Congressman Florio, chairman of the House subcommittee, have indicated that a new authorization bill is high on their agenda for 1983.

In 1982, a very broad-based industry group sought to retain the 1,000 kg. exemption. This group includes CSMA, the U. S.

Chamber of Commerce, the National Association of Manufacturers, and the textile, rubber, oil, automotive, dry cleaning and furniture manufacturing and printing industries. The coalition group is again reviewing the issue.

Meanwhile, EPA has initiated a study of the impact on small generators of any changes in the current regulations. EPA's Office of Solid Waste and Emergency Response is just beginning a comprehensive study of wastes generated by sites covered by the exemption, the relative hazards involved, the quantities of waste generated, the expense to small business if the exemption is removed, and whether or not there is sufficient capacity in existing landfill sites to absorb the additional waste if the exemption is removed. This study, however, will not be complete for at least another year.

The small business community is directly affected by the outcome of the "small generator" issue, and too frequently in the past, the concerns of small business have been overlooked or minimized. We would respectfully urge this subcommittee to fully investigate the small business concerns with RCRA.

FEDERAL INSECTICIDE, FUNGICIDE AND RODENTICIDE ACT

Under the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), the EPA regulates the registration of agricultural and non-agricultural pesticides.

Numerous small manufacturers are directly affected by the different provisions of FIFRA, including the impact that the Section 3 "cite-all" provisions have on small businesses or "me-too" manufacturers, the excessive data requirements at the state level

(sometimes exceeding EPA regulations) that deny small businesses an opportunity to enter the marketplace, the lack of harmony between federal and state laws that allows products to be nationally registered, but not marketed in individual states without state registrations, and a potential user fee system for federal registering of pesticides under FIFRA that might have an affect on small businesses.

Today, we would like to focus our attention on the various proposals for user fees on pesticide registration at EPA, and discuss the adverse impact that these proposals would have on small pesticide manufacturers.

User Fees -- As part of the effort to reduce the federal deficit and become less reliant on tax revenues to meet the public's need for government services, the Administration is vigorously promoting the establishment of user charges whereby the beneficiaries of governmental programs pay for these services in a direct way.

A system of user fees for pesticide registration at EPA is presently being studied by both the legislative and executive branches of government.

A federal user fee registration system could severely affect development costs, particularly for small businesses, and could inhibit the registration of new or improved products. Despite the legislative and executive discussions of user fees, the impact that these user fees would have on the small businesses around the country has not been adequately addressed. We would respectfully urge your subcommittee to fully investigate the effect that user fees for pesticide registration at EPA would have on small business costs as well as inhibiting new or improved products.

We would like to take a brief moment to explain some of the background to the user fee issue.

Background on User Fees -- On September 30, 1978, the Federal Pesticide Act of 1978 (PL 95-396) became law. This law amended the Federal Insecticide, Fungicide and Rodenticide Act in several respects and called for a study on:

"the feasibility of assessing and collecting fees from persons applying to register, or amend the registration of, pesticides to cover the costs incurred by the Environmental Protection Agency."

The fee feasibility study mandated by PL 95-396 was prepared and a report delivered to Congress. The essential findings were that the establishment of a fee schedule for registration actions would be technically and administratively feasible. The Office of Pesticide Programs (OPP), however, recommended that given the large number of complex activities taking place in implementing the new amendments in PL 95-396, it was not prudent to institute a fee system at that time. Once the bulk of the 1978 amendments was integrated into OPP operations, OPP was instructed by the Office of Management and Budget (OMB) to again review the issue of fees for registration. In late August, 1982, OMB posed the issue of whether fees should be established to recover the costs incurred by the Agency for pesticide applicator certification and training.

On September 27, 1982, CSMA submitted a letter to the Agency opposing the implementation of a user fee at EPA for pesticide registration. First, a system of pesticide registration fees would dramatically increase product development costs and have an unfair

and disproportionate impact on small businesses. Second, imposition of registration fees on a federal level would add to a considerable number of similar expenditures at the state level. Third, due to unnecessary delays in the registration process, it would be inequitable to charge pesticide producers for the cost of a program which inhibits their ability to market their products.

A system of fees would shift costs only in that federal spending would be decreased while the ultimate cost of products would be increased. The shift of the burden from taxpayer to pesticide consumer is only theoretical, however, since every taxpayer uses pesticides or pays for their use indirectly.

Under the program, fees (ranging from \$700 to \$25,000) would be charged on: 1) new chemical registrations; 2) old chemical registrations; 3) new biorationals; 4) amended registrations; and 5) experimental use permit processing.

Exclusions would be considered when foreign, state or local governments are involved (such as emergency exemptions and special local need registrations) or where the cost of collecting fees would be a significant portion of the fees collected (such as supplemental or minor use registrations). These fees could have a significant impact on small businesses.

Although no definitive decision has been made at EPA and OMB, Senator Stafford introduced legislation on September 30, 1982, to amend Section 12 of FIFRA:

"to establish a registration fee system adequate to reimburse the Treasury for the costs of pesticide registration and pesticide research and development."
[emphasis added]

Senator Stafford did not have an opportunity to offer his amendment to FIFRA because the bill never came to the Senate floor. The Senator may save this amendment for an appropriate time during the 1983-84 FIFRA reauthorization process.

Although the Reagan Administration is committed to implementing a system of user fees in numerous agencies to reduce the federal deficit, to make programs evolve on a "pay-as-you-go" basis, and to become less reliant on tax revenues to meet the public's need for government services, and although other House-Senate legislative initiatives may come forth in the 98th Congress, we believe that this issue ought to be examined in light of its effect on small business. There is an immediate temptation to lump large and small businesses together without adequately understanding the adverse impact on small manufacturers. We respectfully request that the small business committee look into these consequences.

TOXIC SUBSTANCES CONTROL ACT

Small chemical manufacturers are disproportionately affected by the Toxic Substances Control Act (TSCA).

Small companies generally have chemical sales of less than \$40 million, produce less than 100,000 pounds of a particular chemical per plant site, and employ 30 or fewer employees. These small businesses frequently lack the technical staff available to large companies to generate extensive environmental information and toxicological data. They also lack the administrative capability to handle extensive reporting and recordkeeping requirements, largely because they are labor-intensive businesses that cannot afford to devote unnecessary or duplicative management activity to these tasks. These firms also have limited resources and cannot afford to routinely hire

outside consultants or other personnel, as scientific regulatory resources, as large companies can.

These small chemical companies also have difficulty in taking advantage of their historical ability to be able to innovate and respond quickly to the immediate and specialized needs of a customer. The impact of TSCA has significantly reduced this competitive advantage that small companies with minimal overhead have over larger companies, to meet customer needs. We would like to focus our attention on two difficult problems under TSCA: 1) the TSCA impact on innovation by small business; and 2) the TSCA reporting and recordkeeping requirements for small businesses.

Innovation -- To address the impact of TSCA on innovation within the chemical industry, the Chemical Specialties Manufacturers Association commissioned the Regulatory Research Service, (a part of Kirchner Associates Inc.), an independent consulting firm, to conduct a comprehensive analysis of the Act's effect on the chemical specialties industry. The study was undertaken because of CSMA's concern that TSCA was having a serious adverse impact on development of new products and substances by member firms. It's goal was to provide both a quantitative assessment of the impact on innovation within the industry to date, and build a baseline of data for future evaluation.

One hundred member firms provided data for the study which covers the five year period from 1976 to 1981. Separate analyses were conducted for chemical ingredient suppliers and end-use product manufacturers. The results of the study indicate that a major impact of TSCA has been due to its requirement that firms file a notification with EPA 90 days before the manufacture of any new chemical substance in effect since 1979. Specifically, the study

showed that:

- o TSCA has resulted in a decline of more than 25 percent in new substance development within the chemical specialties industry. Smaller businesses are most severely affected, especially those with less than \$50 million in sales (a decline of 85-95 percent).
- o A significant factor in the decline in chemical specialties innovation is directly attributable to the cost of filing the TSCA required pre-manufacturing notice (PMN).
- o Costs for filing PMNs far exceed simply the time consumed in paperwork. Other factors relate to uncertainty in knowing how to file and what information is required, with the impact again particularly strong on small firms which do not have regulatory expertise.
- o TSCA could have serious future impacts on innovation in the chemical specialties industry, with very significant rates of innovation decline projected for small firms. At present, PMN costs could cause about 30 percent of CSMA's membership to cancel between 12 and 49 percent of their plans for new product development, with smaller manufacturers again most heavily affected.

The CSMA study also indicated potential for several long-term impacts on the chemical specialties industry should the "innovation rejection trend" continue. These include increased failure of small businesses, serious lessening of competition, and a loss of economic productivity and social benefits due to a decrease in innovation.

In summary, the impact of TSCA on ingredient suppliers appears to demonstrate the innovation rates are lower and will continue to be lower until:

- o Direct costs of PMN filing are substantially reduced;
- o Firms understand that toxicity testing is not necessary to obtain a PMN;
- o Firms are better informed about the type and quantity of data necessary for a PMN submission;
- o EPA develops PMN exemption procedures for low risk chemicals (i.e. site limited intermediates, polymers of known monomers, and low volume chemicals) under TSCA section 5(h)(4);
- o EPA simplifies the PMN filing process to reduce costs;
- o EPA recognizes the existence of the commercial practice of customers requiring advance PMNs and makes allowance for this factor in the PMN process.

Reporting and Recordkeeping Requirements -- Although innovation is a significant problem for small manufacturers, the existing burdens of reporting and recordkeeping under section 8 of TSCA also have a disproportionate impact on small businesses. It is possible to reduce these requirements without jeopardizing the information needed to make a fair risk analysis. There needs to be a balance in the statute that addresses the limited resources of small businesses.

A significant number of small manufacturers of chemical substances are vitally interested in the parameters used by EPA to exempt small chemical manufacturers from most of the future reporting and recordkeeping rules issued under section 8(a) of TSCA.

The gathering of risk-related information on chemicals should not strain the limited financial and personnel resources of small companies.

The congressional intent, as well as the legislative history, is very clear. The congressional debate over TSCA indicates an understanding that small companies have fewer administrative personnel and less capability for data compilation and storage than larger firms. The small companies tend to be less automated and more labor intensive, with proportionally fewer resources devoted to management activities, including regulatory compliance. In explaining the section 8(a) exemption language, the House report states that, "Because reporting and recordkeeping requirements under section 8(a) may impose a particularly heavy burden on small manufacturers or processors, the Committee provides an exemption from such reporting and recordkeeping for small manufacturers or processors," H. Rep. 94-1341, 94th Cong. 2d Sess. 42-43 (1976).

Despite the clearness of the legislative history, environmental laws need a uniform definition of small business, including TSCA as well as other statutes. We would respectfully urge the small business committee to further investigate this lack of consistency and continuity in these environmental laws.

We would also urge the committee to address the section 8(d) recordkeeping provisions for small businesses. At present, TSCA requires that all companies maintain their recordkeeping files for 30 years. It is excessively burdensome, unfair, and unproductive to require small companies to keep their records for more

than 10 years. Thus, the present 30-year recordkeeping provisions ought to be examined to see if they can be significantly reduced for small businesses.

When a small business discontinues the production of a chemical substance or sells the chemical portion of their business, the company should be allowed to dispose of these records after seven years. Otherwise, small businesses would encounter significant long-term burdens to store and maintain these records--a burden that would be costly and unproductive. We believe that this problem needs to be fully investigated.

Under the present conditions of section 8(d), all chemical mixtures are included in the recordkeeping provisions. Many small companies shift the percentage of chemical substances in each mixture very frequently, and are presently forced to keep multi-records on the reformulation of each mixture and record shifts in mixture composition. This repetitive recordkeeping provision hampers small businesses and should be fully examined.

CONCLUSION

We at CSMA believe that the Small Business Committee is uniquely qualified to examine the cumulative affect of environmental statutes and regulations on small businesses across the nation. Although other committees will be examining these statutes and regulations in a piecemeal fashion, we hope this committee will make a comprehensive evaluation of these entire statutes, thus analyzing both the cumulative effects of the statutes as well as their inconsistent aspects. We thank you for your attention and consideration of this important small business concern.

COMMENTS OF PHILIP P. FRIEDLANDER, JR.
EXECUTIVE VICE PRESIDENT
NATIONAL TIRE DEALERS AND RETREADERS ASSOCIATION

Submitted to

THE COMMITTEE ON SMALL BUSINESS

Of The

UNITED STATES SENATE

February 25, 1983

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COMMENTS OF PHILIP P. FRIEDLANDER, JR.
EXECUTIVE VICE PRESIDENT
NATIONAL TIRE DEALERS AND RETREADERS ASSOCIATION

Submitted to

THE COMMITTEE ON SMALL BUSINESS
Of The
UNITED STATES SENATE

My name is Philip P. Friedlander, Jr., Executive Vice President of the National Tire Dealers and Retreaders Association, a national nonprofit trade association representing approximately 5,000 independent tire dealers and retreaders located in 50 states, who are engaged in the wholesale and retail distribution of automobile and truck tires, the retreading of tires and the sale of related products and services.

NTDRA appreciates the opportunity to submit to the Committee on Small Business the following comments which express dismay and disappointment regarding the Small Business Administration's proposed size standards. The SBA has invited comments on a second advance notice of proposed rulemaking concerning small business size standards. The SBA's proposed definition of "small business" would consider only the number of employees of a firm as a standard to determine which businesses would qualify for SBA programs, including SBA loans, SBIC's Surety Bonding, Pollution Control, Minority Small Business Capital Development, Procurement Assistance and Property Sales Program, and small business Federal contracts.

The following size standards would be used when determining the size status of tire dealers and retreaders applying for SBA assistance and procurement programs:

Wholesale Trade:

Tires and Tubes 25

Automotive Services:

Tire Retreading and Repair Shops 25

If a firm is involved in several areas of sales or services, its eligibility would be determined only by its primary product,

and not by a combination of all products. The proposed rule further stipulates that part-time and full-time workers would be considered equivalent in determining size standard eligibility.

On June 20, 1980 NTDRA had filed comments in response to SBA's first advance notice of proposed rulemaking on small business size standards. (45 Fed. Reg. 15442 March 10, 1980). At that time we opposed the SBA proposal because it was much too restrictive on tire dealerships and retreading shops. NTDRA argued that without adequate reasoning or explanation, if enacted, the proposal would have eliminated numerous small business firms in every state. We have historically supported current SBA standards which consider sales volume and gross receipts as well as number of employees. On August 2, 1982 we wrote that if the SBA is determined to abandon this satisfactory and workable system with a program that will consider only the number of employees, the agency should set forth realistic proposals that will address and respond to, rather than punish, the small business community.

Mr. Chairman, your committee has jurisdiction in this area. The SBA proposals will seriously hurt the small business community. We urge you and your committee to become involved in the rulemaking process to insure that the final rule will aid, rather than hinder, small business.

As you know, the success and the future of the American economy is critically dependent upon the preservation of real opportunity for small business. Small businesses have historically provided much of the growth in jobs and in innovation, as well as being the provider of services and the deliverer of goods.

In 1976, research conducted for the National Science Foundation revealed that small businesses had been a more prolific source of innovation per research and development dollar than medium or large businesses.

Most small business firms are labor intensive. Currently over half the nation's labor force is employed by small businesses. Small businesses continue to remain among the leaders in employment creation. Research conducted at the Massachusetts Institute of Technology concluded that between 1969 and 1976 more than 86 percent of new jobs were provided by small businesses employing

less than 500 employees. Some 80 percent of the new jobs were provided by firms having 100 employees or less.

Statistics released by the House Small Business Committee indicate that the combination of high interest rates and a weakened economy have threatened the stability of the American small business community. In 1982, 14,043 small businesses went bankrupt, and more than 47,000 small businesses filed for bankruptcy. That is the highest yearly total of bankruptcies since World War II, and just 32 shy of the 1921 yearly record.

Committee Chairman Parren Mitchell (D-MD) noted that in the midst of this economic downturn, small businesses have been faced with record high interest rates. In 1978, the prime rate averaged 9.1 percent, with inflation running at 7.3 percent. In 1981, the prime averaged 18.9 percent, with inflation at 9.2 percent. The "real interest rate" is computed as the difference between inflation and the prime rate. In 1981, the "real interest rate" was 9.7 percent, nearly five times higher than the historical average.

Figures compiled for the House Small Business Committee by Dun and Bradstreet on economic trends reveal a substantial decline in the economic well-being of the small business community.

BUSINESS FAILURES:

	<u>1978</u>	<u>1979</u>	<u>1980</u>	<u>1981</u>
Number	6,619	7,564	11,742	17,043
Change from previous year	-1,300	+945	+4,178	+5,301
% Change from 1978		+14%	+77%	+157%

SOLE PROPRIETORSHIP INCOME: (Business & Professional):

	<u>1978</u>	<u>1979</u>	<u>1980</u>	<u>1981</u>	<u>1982(etc.)</u>
Income-Billions (Constant 1972\$)	\$60.7	\$61.9	\$60.4	\$58.1	\$54.8
% change from 1979			-2.4%	-6.1%	-11.6%

Given our nation's economic and unemployment difficulties, SBA would be negligent to ignore the resources and potential

contributions of small business enterprises. Their innovative spirit, their flexibility to meet new challenges, are crucial to our economic progress. The employment and entrepreneurial opportunities presented by the small business sector are too important to be less than fully realized. The bottom line is that America needs small business formation and growth.

In March 1982 President Ronald Reagan issued a report on the State of Small Business. Recognizing the importance of small business, and responding to economic needs and demands of this sector, the President asserted: "This Administration is committed to assuring unrestrictive access for small business to all segments of our economy (p.4)." He further states that "...this Administration is establishing an economic environment conducive to small business formation and growth." (p.5)

The proposed size standards asset forth by the SBA, a branch of the Executive Office, ignore Mr. Reagan's report and assertions, and clearly neglect current small business economic trends. Congress created the SBA to aid, and not punish, small businesses.

With the nation's economic well being resting so heavily on the continued success of the small business community, a sector that is experiencing increased bankruptcies and financial difficulties at an alarming rate, it seems unbelievable that the government agency created and dedicated to aid and protect small business would issue a proposal that would remove literally hundreds of thousands of small businesses from SBA assistance and procurement programs.

NTDRA sympathizes with the SBA and understands the difficulties inherent in establishing a small business size definition. Although there are numerous and varying definitions of small business, the one agreed upon by the 1980 White House Conference on Small Business was that of businesses employing 500 employees or less. If the SBA is committed to go to a number of employees formula for determining the size status for a business, NTDRA supports the conclusions of the 1980 conference. NTDRA and many of its members were active participants in that event.

NTDRA is a trade association representing small business retailers and retreaders. Yet the proposed SBA definition of small business would exclude 13 percent of our tire dealer members and 27 percent of our retreader members (figures based on a recent questionnaire sent to all our members, with a 60 percent response rate). By raising their totals to 200 employees for wholesale trade (tires and tubes) and automobile services (tire retreading and repair shops), they would include 97.66 percent of our tire dealer members and 97.46 percent of our retreader members.

NTDRA contends that the SBA has misinterpreted the Census Bureau data examined. We believe that, for example, a retreader or retailer who has a principal area of business (employing 60 persons) and 6 branch stores (each employing 8 workers) appears not as one employer with 108 employees but rather as 7 businesses averaging 15 employees. Because of competition with company-owned stores and mass merchandisers, and because of a survival need to expand to automotive servicing and repairing, the small independent tire dealer and retreader has had to adjust -- he should be commended rather than punished for his efforts.

One of our members in California, in commenting on the SBA proposal, presents an example of our concern. He is a retreader who employs 35 full-time employees, 6 part-time employees, and he and his wife are on the payroll. He asserts that, due to the great number of SBA programs in which he is involved, if the proposal becomes enacted he would be faced with a decision to release his part-time help and 12 of his full-time staff to preserve his small business size status and thus his small business Federal contracts. He would also be forced to abandon all innovative efforts. Thus the proposal could have the effect of hindering production and innovation, and could actually increase unemployment.

Recently, President Reagan signed into law the Small Business Innovation Research Act. The legislation requires that one percent of agency R & D budget in excess of \$100 million be set aside for small business when the contract, grant, etc., is in excess of \$10,000. We contend that our members who employ in the range

of 50-200 employees would be in the best economic position to utilize the new funds. Our smallest members, in the range of 25 employees or less, are rarely in a position to undertake innovative changes. Thus a meaningful percentage of our membership would be discriminated against. Successful retreaders, for example, could not apply for research grants to further the recycling of tires which saves for the nation oil and other natural resources.

In conclusion, NTDRA opposes the SBA proposal because it is much too restrictive on tire dealerships and on retreading shops, and we urge the Senate Small Business Committee to recognize the inequities of the proposal and to work with the small business community toward the adoption of a reasonable rule. While we support current SBA standards, we believe that if SBA is committed to changing to a number of employees formula for determining what is a small business, the SBA should adopt the findings of the 1980 White House Conference on Small Business and label as small business all firms with less than 500 employees. Specifically, with regard to tire dealerships and retreaders, any proposal of less than 200 employees would be unfair and unrealistic and should be withdrawn.



National Automobile Dealers Association

6400 WESTPARK DRIVE • MCLEAN, VIRGINIA 22102

March 10, 1983

Senate Small Business Committee
U.S. Senate
Washington, D.C. 20515

The Small Business Committee:

The National Automobile Dealers Association appreciates and welcomes the opportunity to assist your committee in planning the legislative agenda for the next two years. The following issues — while of specific concern to NADA — also directly impact on a large segment of the small business community.

Of paramount concern to the small business community and the nation is, of course, lower interest rates. The recent declines in the prime rate must continue if sustained economic growth is to ensue. Until the enormous gap between interest rates and the present inflation rate is bridged, interest rates will continue as "the" issue of greatest concern to the small business community.

Remaining issues of concern which are more exclusively legislative are:

1. RESOURCE CONSERVATION AND RECOVERY ACT REAUTHORIZATION
(Small Generator Provision):

RCRA is the principal law governing the disposal of hazardous waste. Currently, there is a 1000 kilogram per month exemption for small generators (translated small businesses) of hazardous waste.

Consideration was given during the 97th Congress to regulating small generators down to 100 kilograms per month or lower. If such regulations must be implemented, careful consideration should be given to the manner in which small businesses should be regulated. It would be disastrous, both from a cost and compliance standpoint, if small businesses were regulated by the same guidelines already imposed on large generators.

Large generators today are governed by a testing, labeling and manifesting system which would be extremely difficult for the small business to comply with. If a determination is made that small generators should be regulated, a different method of compliance must be developed.

2. DOMESTIC CONTENT (Fair Practices In Automotive Products Act):

Briefly stated, domestic content will require automobile manufacturers to have a fixed percentage of a car's content (parts and labor) added in this country. The specific percentage of domestic content required of a manufacturer will be determined by the number of cars sold in the U.S. If passed, this bill will substantially increase new car prices and severely restrict the imported car market.

While on the surface this bill appears to be related exclusively to the automotive industry, its impacts would be farreaching. Retaliatory actions by America's trading partners will ensue, jeopardizing exports and jobs in many essential American industries. The Congressional Budget Office estimates that more jobs will be lost as a result of this bill than will be created. And for this reason, representatives of agriculture and high technology groups, among many others, strongly oppose this concept.

A list of those groups opposing domestic content is attached for your information.

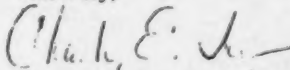
3. BANKRUPTCY REFORM:

Since bankruptcy reform legislation became effective in 1979 personal bankruptcies have increased dramatically. A large percentage of these bankruptcies can be attributed to recent economic conditions. However, many debtors are completely discharging their debts utilizing Chapter 7, even though they may be capable of making some payments on their debts under a Chapter 13 plan. Unnecessary discharging of debts results in higher prices for other consumers and a drain on available credit.

Changes must be made in the bankruptcy laws. And there appears to be a large measure of support for substantive changes in the law as many members, both House and Senate, cosponsored bills during the 97th Congress to effect these necessary changes. NADA would urge support of a bill which provides consumers with the bankruptcy relief necessary, while at the same time curbs existing abuses.

NADA hopes the preceding review will be of some assistance in your endeavors. If you have further questions regarding these issues, please do not hesitate to give us a call.

Sincerely,



Charles E. Ing
Assistant Director of Legislative Affairs

CEI/kjr
Enclosure

AEROSPACE INDUSTRIES ASSOCIATION OF AMERICA
 AMERICAN ASSOCIATION OF EXPORTERS AND IMPORTERS
 AMERICAN ASSOCIATION OF PORT AUTHORITIES
 AMERICAN ELECTRONICS ASSOCIATION
 AMERICAN INTERNATIONAL AUTOMOBILE DEALERS ASSOCIATION
 AMERICAN RETAIL FEDERATION
 AMERICAN SOYBEAN ASSOCIATION
 AUTO IMPORTERS OF AMERICA
 CATERPILLAR TRACTOR COMPANY
 CERTAINTED CORPORATION
 COLONIAL SUGAR COMPANY
 COMPUTER AND BUSINESS EQUIPMENT MANUFACTURERS ASSOCIATION
 CONSUMERS FOR WORLD TRADE
 CONTINENTAL GRAIN COMPANY
 COUNCIL FOR A COMPETITIVE ECONOMY
 DELAWARE RIVER PORT AUTHORITY
 IMPERIAL SUGAR COMPANY
 INTERNATIONAL APPLE INSTITUTE
 INTERNATIONAL ASSOCIATION OF ICE CREAM MANUFACTURERS
 INTERNATIONAL HARDWOOD PRODUCTS ASSOCIATION
 LEAGUE OF WOMEN VOTERS OF THE UNITED STATES
 LOCKHEED CORPORATION
 MASSACHUSETTS PORT AUTHORITY
 MILK INDUSTRY FOUNDATION
 MILLERS NATIONAL FEDERATION
 NATIONAL ASSOCIATION OF STEVEDORES
 NATIONAL ASSOCIATION OF WHEAT GROWERS
 NATIONAL AUTOMOBILE DEALERS ASSOCIATION
 NATIONAL BROILER COUNCIL
 NATIONAL CORN GROWERS ASSOCIATION
 NATIONAL COUNCIL OF FARMER COOPERATIVES
 NATIONAL CUSTOMS BROKERS AND FORWARDERS ASSOCIATION
 NATIONAL FOREIGN TRADE COUNCIL
 NATIONAL GRAIN TRADE COUNCIL
 NATIONAL GRANGE
 NATIONAL RETAIL MERCHANTS ASSOCIATION
 NATIONAL SOYBEAN PROCESSORS ASSOCIATION
 PHILADELPHIA PORT CORPORATION
 PORT OF BALTIMORE
 PORT OF PORTLAND
 POULTRY AND EGG INSTITUTE OF AMERICA
 SCIENTIFIC APPARATUS MAKERS ASSOCIATION
 SEMICONDUCTOR INDUSTRY ASSOCIATION
 THE BOEING COMPANY
 THE RICE MILLERS' ASSOCIATION
 U.S. CANE SUGAR REFINERS ASSOCIATION
 U.S. CHAMBER OF COMMERCE
 U.S. COUNCIL FOR INTERNATIONAL BUSINESS
 VOLUME FOOTWEAR RETAILERS OF AMERICA
 XEROX CORPORATION

National Association of Metal Finishers

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NAMF

an organization of
management executives
in the fields of
metal finishing and allied arts

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TESTIMONY OF JAMES P. LEMONIAS PRESIDENT

NATIONAL ASSOCIATION OF METAL FINISHERS

SUBMITTED TO

THE

SENATE COMMITTEE ON SMALL BUSINESS

Chicago

Washington

TESTIMONY OF JAMES P. LEMONIAS
NATIONAL ASSOCIATION OF METAL FINISHERS
BEFORE THE
SENATE SMALL BUSINESS COMMITTEE

Mr. Chairman and Members of the Committee, the National Association of Metal Finishers (NAMF) appreciates the opportunity to present testimony to the Committee on Small Business concerning our issues of legislative priority. The Pollution Control Financing Guarantee Program administered by the Small Business Administration has greatly assisted the metal finishing industry. I urge the Committee and the entire Senate to take the necessary actions to restore the vitality and effectiveness of this important program.

I am James P. Lemonias, President of NAMF. My company, Whitman Plating Co., Inc., of Whitman, Massachusetts, presently employs 25 people.

NAMF represents an industry which comprises over 9,000 job shop metal finishing firms across the country. We are, in the truest sense, an industry of small business. A typical electroplating firm employs 15 to 20 people and is capitalized at about \$250,000. Generally speaking, our association members experience only modest returns on their investments due, in large part, to the competitiveness of the small independent metal finishers and the presence of large so-called captive shops that finish their own products.

Metal finishing is a vital part of this country's manufacturing economy. Essentially every manufactured product, ranging from automotive and aerospace goods to surgical instruments and printed circuits for computer technology, are coated. Metal finishing results in a much safer and more efficient product. It also produces tremendous economic savings for the consumer by extending the life of the products and reducing maintenance and/or replacement costs.

NAMF is in a unique position to comment of SBA's Pollution Control Financing Program. Our industry has been in the forefront of activities involving Federal Water Pollution Control requirements. More specifically, metal finishing is one of the first industries for which EPA has developed pretreatment standards. Those regulations require that, by April, 1984, electroplating job shops must have the required technology on line and operating. Our association is actively involved in trying to remedy the problems created by the regulations, but it is not my intent to consume the Committee's time with those details. More relevant to this Committee's interest is the fact that whether pretreatment is required by the Federal government or through local programs developed by publicly owned treatment works (POTW's), (which NAMF strongly favors), the metal finishing industry will need considerable financial assistance.

Based on conservative estimates by the Environmental Protection Agency, the regulations would cost our industry over one billion dollars in capital, over \$490 million annually in operating expenses, and would result in the closure of about twenty percent of the metal

finishing facilities in this country. Needless to say, this is a staggering economic burden for our industry to bear, particularly when environmentally sound treatment alternatives exist. I should point out that EPA, when it issued its regulations, estimated this closure rate could be reduced if adequate SBA loan and other financial assistance was made available. The following is taken from EPA's regulations:

"...the projected economic impacts of these standards are a major concern to the agency. The potential adverse effects of this regulation can be substantially reduced through the use of Small Business Administration Economic Injury Loans.

The agency has been working with the Small Business Administration to insure that loans and other financial assistance programs will be available to eligible firms affected by these standards..."

Unfortunately as we all know, the funding level for many SBA programs, including financing guarantees, has been sharply reduced and/or restrictions are being placed on the eligibility of certain guarantees. This is particularly disturbing since the guarantee program has not cost the Federal government any money and in fact has enabled many businesses to continue operating and contributing to the economy. It is very difficult for me to understand how the economy is benefitted if these businesses are not able to continue operating which will be the case in the absence of some form of financial assistance.

Small businesses have a serious problem obtaining the necessary financing to cover the high cost of purchasing and operating pollution control equipment. Access to public and private markets for

that type of assistance is usually not available. SBA's Pollution Control Financing Guarantee Program has been one of the few tools our members have been able to use. While we do not have the data base to establish exact figures, we do know a significant percentage of that program's resources have gone to the metal finishing industry. It is one of the few Federal programs responsive to the needs of small business confronted with federal, state and/or local environmental regulatory requirements.

As the metal finishing industry endeavors to comply with pretreatment requirements regardless of which governmental level they emanate from, much of the industry simply will not be able to comply without programs such as SBA's Pollution Control Financing Guarantees. Metal Finishers will be required to borrow amounts equal to their present capital in order to finance their purchase of pollution abatement systems needed for pretreatment compliance. As I mentioned earlier, without some form of governmental assistance, private institutions are unlikely to provide the necessary capital. This problem becomes even more acute when viewed in conjunction with other waste disposal requirements such as those of the "Resource Conservation and Recovery Act" which will seriously affect many small businesses. Mr. Chairman, we vitally need the type of Federal assistance offered by SBA's Pollution Control Financing Program and I can assure you that need will only intensify as more and more businesses attempt to meet necessary environmental requirements.

We appreciate this opportunity to explain our involvement with the program and hope our views will be useful to the Committee.

STATEMENT OF
BASIL J. MEZINES
BEFORE THE
COMMITTEE ON SMALL BUSINESS
UNITED STATES SENATE

February 25, 1983

Chairman Weicker, Senator Nunn, members of the Committee on Small Business. Thank you for inviting me to appear at this meeting. My name is Basil Mezines. I represent the Automotive Warehouse Distributors Association.

AWDA is a nationwide trade association whose members include over 600 warehouse distributors of automotive replacement parts and nearly 250 manufacturers of such parts. Most members of AWDA are small businesses. The typical warehouse distributor has annual sales below \$8 million.

Members of AWDA have been particularly hard-hit during the recession of the past few years. As I am sure you are aware, the automotive industry as a whole has felt serious adverse effects from the recession, high gasoline prices and foreign competition. These are serious problems which merit the attention of this Committee and Congress as a whole, not just because they adversely affect members of AWDA and other small businesses, but because their effects are felt throughout all sectors of the economy.

This morning, however, I would like to address one specific problem facing the members of AWDA, and urge this Committee to take action to ameliorate this problem.

The problem arises under the performance warranty provisions in Section 207 of the Clean Air Act, and the regulations of the Environmental Protection Agency promulgated thereunder. Pursuant to the Act and the regulations, numerous automobile components which may indirectly affect

engine emissions must be warranted by the manufacturer of the automobile for five years or 50,000 miles. Most other car parts are typically warranted for one year or 12,000 miles.

These long term warranties create a monopoly in service repair work in favor of franchised new car dealers to the exclusion of the independent automotive aftermarket serviced by AWDA members. The monopoly arises because consumers will naturally have all covered repairs for five years handled by the franchised dealer of the car manufacturer from whom he purchased the car. Not only is it human nature for a consumer to seek to have his repair work done for "free," but the car manufacturers may terminate the warranties if the covered parts are repaired by anyone other than an authorized dealer during the warranty period.

Historically, more than 80% of the 130 million cars in use have been maintained by the independent aftermarket upon expiration of the commercial new car warranty. During the warranty period, owners return their new cars to the dealer for service and repair. The very reference to warranties in the owner's manual creates a "glove box psychology." To the consumer, the current 5 year/50,000 mile emissions warranty provisions of the Act imply that additional "free" work is possible on certain parts. The owner will continue to return the car to the dealer with the hope or expectation that the work will be covered by the warranty, even where the owner's service problem is not covered by the warranty.

The emissions warranty is not a free consumer benefit, as projected liabilities are calculated into the sticker price of a new car by the manufacturer. The consumer pays for this warranty when he buys his car. Moreover, he continues to pay for it whenever he brings his car in for service.

While the car is at the dealer for warranty repair, the owner traditionally has had the dealer perform such routine maintenance as replacing worn parts (i.e., filters, spark plugs, shocks, etc.). Survey after survey has concluded that consumer complaints are much fewer when the work is performed by the independent aftermarket. Other data show that for the same service work which would cost \$18 in an independent garage, it will cost \$21 at a dealership. No law should mandate a 16% increase in consumers' repair bills.

In March 1980 the Director of the Bureau of Competition of the Federal Trade Commission stated:

Congress, the FTC, the Department of Justice and the affected independent aftermarket firms agree that a five year emission warranty will divert business from the independent sector to franchised car dealers. This will force many small businesses to leave the aftermarket industry and could result in higher repair prices and inconvenience for consumers.

Comments of the Bureau of Competition Federal Trade Commission Regarding California Automobile Emission Control System Warranty Regulations, March 3, 1980 at 7.

The injury to competition caused by the extended warranty was addressed in H.R. 5252, the bill proposed last year to amend the Clean Air Act. One section of the bill would have reduced the warranty period to two years or 24,000 miles, a change which AWDA and numerous other automotive industry associations supported. However, other provisions of H.R. 5252 were quite controversial and the bill did not pass last session.

Regardless of any action which may or may not be taken with respect to the more controversial amendments to the Clean Air Act, I urge this Committee on behalf of AWDA to support legislation to reduce the mandatory warranties on emission-related automotive components from 5 years/50,000 miles to 2 years/24,000 miles.

I wish to thank you, Mr. Chairman, and members of the Committee for this opportunity to present the views of the Automotive Warehouse Distributors Association.

Housing at the Crossroads

The nation's beleaguered but resilient housing industry -- still reeling from the effects of the longest and most devastating recession since the Great Depression -- stands at an historic crossroads as it enters 1983. One path leads to economic recovery, a rebound in housing production and renewed public confidence. The other path puts the nation back on the same old merry-go-round of slow growth, volatile interest rates, record high unemployment, unacceptable budget deficits and political and social unrest.

The odds for recovery improved in October 1982, when the Federal Reserve Board shifted gears and gave the economy room to expand. As the FED eased its foot on the monetary brakes, the marketplace showed a spark of life. Interest rates declined; Wall Street rallied; home sales and new construction picked up; and demand for shelter showed signs of breaking loose after being bottled up for more than three years.

However, many critical problems remain unsolved that could delay, interrupt or even abort the anticipated recovery.

The recession of 1979-82 has cut deeper into the economic and social fabric of this nation than any since the Great Depression. More than 12 million Americans, including some 1.2 million in the construction industry, remain unemployed and business bankruptcies are still running near peak levels. While interest rates have declined, the real cost of money remains six percentage points above the rate of inflation. The rate of home sales and new construction -- though improved from a year earlier -- are still far below levels required to meet the shelter needs of this country.

Moreover, the 1983 outlook is clouded by continuing runaway federal deficits that threaten to break the \$200 billion mark for the foreseeable future. Meanwhile, the mortgage finance system -- once the cornerstone of America's housing policy -- is still hanging in limbo after being rocked by shifting government priorities, bank deregulation, intense competition for savings and years of inflation and unpredictable interest rates.

This nation and this industry face a unique challenge at this turning point in American history. That challenge is to mount another housing-led economic expansion without reigniting runaway inflation. Meeting this challenge will require a delicate balance of fiscal and monetary policies. It will require bold, nonpartisan action and a spirit of cooperation and common purpose on the part of President Reagan, the United States Congress and the Federal Reserve Board. And it will require a renewed commitment to the goal of providing decent, affordable shelter for all Americans -- a goal first mandated by Congress in 1949 and reaffirmed since then by every Congress and every Administration.

Economic Policies

During the past two years, the economy has been seriously shaken by an explosive combination of fiscal, tax and monetary policies that are not only incompatible, but in direct conflict with one another -- creating a tug-and-pull in the marketplace. The most obvious was the Administration's attempt to rev up the economy with expansionary fiscal and tax policies -- the \$1.6 trillion build-up in the national defense and a \$750 billion tax cut. Simultaneously, the Federal Reserve Board was slowing the economy by reducing the nation's credit supply. This combination of policies sent interest rates and budget deficits soaring and deepened and prolonged the national recession.

By mid-1982 it became apparent that some mid-course policy corrections were needed to steer the economy away from the edge of the cliff. The Congress and the Administration subsequently adopted a major revenue-raising bill and a few months later, in October 1982, the Federal Reserve abandoned its doctrinaire experiment in monetarism. This shift in policies was followed by a free-fall in interest rates, a major rally on Wall Street and the modest beginnings of a recovery in the housing market. To maintain and to add to this momentum, some additional changes in policy will be required in 1983.

Reduce federal deficits. First and foremost on the agenda is the problem of skyrocketing federal deficits. The deficit for the fiscal year ending September 1982 reached a record \$113 billion, more than twice the size of the Administration's original estimate. The federal deficit for the current fiscal year as well as fiscal years 1984 and 1985 could top \$200 billion under current spending and tax proposals. Deficits of that size could open the door to another serious credit crunch down the road -- a development that would send interest rates soaring again and weaken, if not destroy, the recovery. This deficit crisis must be avoided.

To reduce projected budget deficits, the Administration and the Congress must tackle the "big-ticket" items that heretofore have been ruled off-limits from the budget-cutting process. This would include scaling back on defense spending and containing the soaring costs of entitlement programs that, along with interest payments on the national debt, now account for 70 percent of the entire federal budget.

Lower interest rates. As the economy catches its breath following three years of record high interest rates and tight money, it is vitally important that the Federal Reserve Board pursue a monetary policy that would permit a further decline in interest rates, giving both consumers and business access to affordable credit so desperately needed to turn the economy around. Any return to the monetarist policies of the past would choke off the economic recovery.

Create new jobs. Each one percentage point decline in the national unemployment rate cuts the federal deficit by an estimated \$29 billion. The Administration and the Congress must pursue policies that will generate growth, bolster public confidence, put Americans back to work and help put the building industry back on its feet. A housing-led economic recovery is, by far, the best and most effective way to reduce the soaring deficit.

Housing's contribution would be significant. An additional 400,000 housing starts -- the difference between the 1 million units started in 1982 and the 1.4 million starts forecast for 1983 -- would create 700,000 new jobs, \$13 billion in wages and \$6 billion in additional tax revenue for local, state and federal governments.

Revitalize the Housing Partnership

Between the end of World War II and the beginning of 1983, entrepreneurs built more than 56 million homes and apartment units, and rehabilitated and restored millions more. America was transformed from a nation of poorly housed people into a nation of well housed property owners.

These great achievements didn't come easily. There were intermittent interruptions in the nation's housing delivery system. But this nation never lost sight of its ultimate goal to provide decent housing for all Americans. As the housing market grew and matured throughout the post-war period, a strong working partnership developed among the private building industry, the financial marketplace and government at all levels. Housing was ranked as a top national priority. It enjoyed strong bipartisan support as the nation's elected leaders recognized the economic, social and political benefits of a well housed nation. What was good for housing was accepted as being good for the country.

In the past, the federal government's role in the housing market has been focused in two primary areas. First, the government provided direct and indirect assistance to the poor, the elderly and disabled, who were unable to compete for housing in the private marketplace. Secondly, the government helped shape a financial system that gave home buyers access to long-term credit at affordable rates. For example, the government chartered specialized mortgage lending institutions, insured mortgage loans against default, created a sophisticated secondary mortgage market and permitted taxpayers to deduct mortgage interest and property taxes.

That partnership, unfortunately, has been badly shaken recently by changes in the economy and shifting government priorities at a time when the need for affordable housing is at an all-time record level.

The time has come for this nation's elected leaders to reaffirm their commitment to housing. By taking the best from the past and building on it, a dynamic partnership between government and private industry can be revitalized to make housing a top national priority again and to provide decent housing in a suitable living environment for every American family.

Strengthen the Mortgage Finance System

A long-term, national strategy needs to be developed to strengthen and stabilize the nation's mortgage finance system, focusing on ways to reestablish housing's priority in the financial marketplace and to provide home buyers with access to mortgage money at rates and terms they can afford.

This nation must eliminate the myth that America is overhoused and that too much credit has flowed into housing investment. That notion -- occasionally expressed by the President's top economic advisors -- ignores the facts.

Providing favorable credit and tax treatment for housing is a policy worth preserving. This policy has been good for the American people and good for the economy. It has paid off in rich dividends, opening the doors to home ownership for millions of Americans and giving the average working man a stake and a sense of pride in this democratic society. The fiercely competitive housing system that emerged became a driving force behind the economic progress of the last four decades, providing jobs for millions and generating demand for goods and services throughout the economy.

To strengthen the mortgage finance system, immediate consideration should be given to the following programs and policies:

- * Creation of a tax credit for all investors in residential mortgages, one of the most significant recommendations made by the President's Commission on Housing.
- * Creation of tax-exempt Individual Housing Accounts -- another Presidential Commission recommendation -- as a way to encourage young Americans to save for a down-payment on a home.
- * Adoption of legislative and regulatory reforms that would remove the obstacles preventing pension funds from investing in residential mortgages, also a recommendation proposed by the President's Commission on Housing.
- * Elimination of sunset provisions for tax exempt revenue bonds, thus permitting the issuance of state and local tax-exempt mortgage revenue bonds after 1983.
- * Development of new multifamily financing vehicles, including a rental housing production program and methods for refinancing balloon mortgages on rental property.
- * Expansion of efforts to strengthen existing primary and secondary mortgage market mechanisms, including FHA/VA programs, GNMA, FNMA, and FHLMC, and support of legislative and regulatory proposals to expand the role of private mortgage-backed securities.
- * Support and encourage private innovative financing concepts, such as NAHB's Home Mortgage Access Corporation, to give home builders direct access to the secondary market.
- * Oppose any further direct involvement of financial institutions and their subsidiary corporations in the land development and building businesses.

Regulatory Reform for Affordable Housing

The fastest growing segment of the nation's housing market is made up of millions of young, first-time home buyers, nearing or in their 30s, who are in need of "affordable" housing. Builders have responded to this strong demand for starter homes by shifting to the development of smaller units, built on less land, with higher densities, modern layouts and amenities and innovative, energy-conserving features.

Some communities have moved much faster than others in taking positive steps to enable the building industry to meet the challenge of providing affordable housing. At a time when local governments should be looking for ways to encourage greater efficiencies in the production and delivery of new homes, some have stood adamantly behind rules and regulations that were written long ago, have since become outmoded, and are today a major impediment to the construction of affordable housing.

The issues of government overregulation of the housing industry are numerous and complex. In some areas, overregulation occurs in the form of excessive building fees that are actually an attempt of local governments, confronted by overburdened taxpayers, to balance their budgets on the backs of new home buyers just coming into the community. Sometimes, restrictive zoning regulations are imposed to fence out new growth. Elaborate and needlessly prolonged procedures for obtaining permits may be the result of understaffed building inspection offices. And many times, overregulation is simply the product of a lumbering bureaucracy that, once set in motion, never stops to consider the relevance of various inefficient codes to safety, health and the public good.

Whatever the cause, overregulation adds thousands of dollars to the cost of building housing and is therefore an excess this nation can no longer tolerate or afford.

To bring about regulatory reform of the housing industry, federal, state and local governments, with the support and cooperation of private industry and NAHB, should move quickly and forcefully to implement the major recommendations of the President's Commission on Housing. Specific recommendations on regulatory reform that deserve immediate attention are:

- * Requiring federal agencies to prove the need for new regulatory actions through cost/benefit analysis and housing impact studies;
- * Repealing zoning regulations that deny or unreasonably limit development of all types of housing;
- * Updating density requirements so that they do not interfere with market forces;
- * Promoting infrastructure development financed from general governmental revenues and in such a way that it does not unduly burden the housing consumer;
- * Reducing fees and dedication requirements that exceed the actual costs involved in building new developments in the community;

- * Streamlining the permit process to enable builders to break ground on their projects in as timely a manner as possible;
- * Repealing rent control ordinances that lead to housing shortages and ultimately hurt the very people they are intended to help.
- * Designing innovative and equitable programs at all levels of government to meet the housing needs of Americans unable to compete in the free marketplace without imposing mandatory inclusionary zoning ordinances.

Housing: Shelter for the People, Jobs for the Economy

A strong, competitive building industry is vital to the national economy. The industry provides shelter for the American people and jobs for the economy -- both of which are desperately needed during this period of near Depression-level unemployment and record demand for affordable housing.

The significance of a healthy housing industry goes far beyond providing shelter and jobs. The opportunity for Americans from all walks of life to work hard and to live in decent, affordable shelter, is the glue that holds together this free and democratic society. It gives Americans the drive and incentive to excel in their individual endeavors, to climb the ladder of success and to improve their standard of living. Equally important, it gives them a sense of self esteem and independence as well as a sense of pride and involvement in their local community.

Awesome challenges confront America in 1983. Seven times since 1946 the building industry has led the nation from recession to recovery. Now is the time for the Congress, the Administration, the Federal Reserve Board and private enterprise to work together for policies that will lead to lower interest rates, lower federal deficits, lower unemployment and provide decent, affordable housing for all Americans.

Board of Directors Action:	Approved
Joint Executive/Resolutions Committee Action:	Recommends Approval
Resolutions Committee Action:	Recommends Approval

RECOMMENDATIONS OF THE
NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC.
TO THE
UNITED STATES SENATE SMALL BUSINESS COMMITTEE
CONCERNING
LEGISLATIVE AGENDA ITEMS

To begin with, and as this Committee is aware, the NASD has long believed that the concerns of small business are the concerns of America. The long-term viability of our economy depends upon the health and growth of America's small businesses. Whenever entrepreneurs, acting singly or in small groups, transform their dreams into practical applications, they plant the seed for further expansion of economic activity. This expanding economic activity in turn produces the new wealth that is so essential to the nation's continued growth and economic stability.

Unfortunately, the current economic realities continue to buffet small business throughout the nation. Taxation, burdensome regulation, the ravages of past inflation, economic concentration through increased merger activity, and the lack of public markets for their securities are some of the factors which have combined to exacerbate the problems already faced by small businesses in their day-to-day struggle to survive and prosper within a free market governed by open competition.

The NASD is vitally concerned with both the welfare of our small business sector and its ability to raise capital in the securities markets. Demonstrative of this concern, the NASD formed a special committee in the fall of 1978 to address the capital-raising problems of small business. The Committee produced a report entitled, Small Business Financing: The Current Environment and Suggestions For Improvement in which it set forth a strategy for correcting what it perceived as the severe problems besetting small business. The report was presented to this Committee on May 22, 1979.

Subsequent to its presentation, a number of the report's recommendations were incorporated into legislative proposals that were considered by Congress. The NASD appeared on Capitol Hill numerous times to support the passage of these

measures. More recently, the NASD actively participated in the first congressionally mandated annual SEC Government-Business Forum on Small Business Capital Formation which reviewed the current status of problems and programs relating to small business capital formation and sent to Congress a summary of the Forum's proceedings and recommendations. The NASD is now participating with the SEC in planning the second such forum which is to be held later this year.

Prompt Consideration of SEC Government-Business Forum Recommendations

The NASD is fully supportive of the work of the SEC Government-Business Forum and believes that the recommendations developed at the first forum were well thought out and worthy of prompt consideration by interested Committees of Congress and the appropriate federal agencies. Clearly, the grass roots input developed by such sessions is quite useful and provides an appropriate link for developing a stronger small business sector. The Forum's suggested changes to the tax code would, in the NASD's opinion, enhance the profitability of small business and thereby encourage more entrepreneurs to become involved in such enterprises. By making such small business enterprises more attractive financially through these measures, the Congress will enhance the chances of small business gaining greater access to the capital markets. Likewise, those recommendations for expanding the Small Business Administration's ability to help these enterprises will enlarge the pool of financial resources available to small business and thereby aid them in their search for working capital.

Review of NASD Proposal Calling For Tax-Deferred Reserves For Market Makers

Along with supporting the Forum's work, the NASD would like to reiterate its support for the tax-deferred market making reserve proposal first offered in its 1979 Special Report. This proposal would allow securities market makers to defer gains from their market making activities in small business issues. Subsequent to its initial appearance, the proposal received substantial bipartisan support and was incorporated into a number of bills none of which, unfortunately, have yet been adopted. This proposal is, in our view, critically important, particularly as the number of securities firms engaged in risk market making continues to decline in the face of an increased need on the part of small businesses for additional sources of new capital.

Also, with the growing influence of institutions in the securities markets, it was disconcerting to learn — from a nationwide survey the NASD conducted — that these investors generally follow investment practices which discourage or overlook investments in the securities of smaller companies. This is due in large measure to a concern on the part of these investors over the lack of depth and liquidity in the markets for many of these securities.

In that connection, the NASD believes the best way to develop improved markets in small business securities (and thus their ability to raise capital through new offerings of securities) is to allow broker-dealers to set aside gains derived from their market making in small business issues into banking-type tax-deferred reserves. The proposal would impose limitations both on the amount of profit that could go into the reserve in any one year (30% of the fair market value of average inventories carried for market making purposes) and the total amount that could be reserved at any one time (\$1 million). By virtue of these limitations, the total impact on the Treasury of tax-deferred reserves for market makers would be very small. However, the leverage effect achievable through these reserves can be very great. Furthermore, the existence of such reserves would provide a broker-dealer with some limited form of protection against losses incurred in the performance of his risk-taking function. Also, the use of reserves would serve to smooth out the tax consequences which accrue to the broker-dealer community which operates in a highly-cyclical industry. Finally, these tax-deferred reserves would provide a much-needed cushion during periods when markets are declining and the need for a viable broker-dealer community is the greatest.

Impact on Small Business of SEC's Proposed Order Exposure Rule

Finally, we would like to address an issue which believe may very well affect small businesses and smaller broker-dealers. It concerns SEC proposed Rule 11A-1. Generally referred to as an "order exposure" or anti-internalization" rule, the proposal would impact small broker-dealers by permitting only firms registered and acting as market makers to buy and sell stocks directly with customers from the firm's own inventory accounts (principal transactions). As proposed, the rule has been limited to what are known as "19c-3 securities"; that is, those securities which have listed on an exchange since April 26, 1979. There are currently 484 such securities with 53 NASD members making markets in these securities.

Notwithstanding the relatively narrow application of the proposed rule, the NASD is concerned that some future Commission could expand the coverage of the rule and its market making requirement to include a far greater universe of securities, including those of small businesses.

Many firms when presented with an order from a customer will execute the order from their existing inventory. This is done primarily because the execution of that type of transaction is less costly than going to an exchange or over-the-counter market maker to fill the order. The rule provides that only market makers can deal with customers on a principal basis. Registering and acting as a market maker involves substantial equipment and personnel costs which many small broker-dealers can not afford. Even if a small broker-dealer became registered as a market maker, the complexity of the rule's other provisions would add additional significant burdens and costs that would make order execution extremely inefficient.

For many small broker-dealers which route their orders to exchanges or over-the-counter market makers, the proposed rule would make this process far more costly. Many of these firms use the automated execution systems which the securities industry has developed to more efficiently process small orders. These facilities include the NASD's Computer Assisted Execution System and the automated execution systems maintained by the Midwest, Pacific and Philadelphia stock exchanges. The modification of these automated facilities to accommodate the proposed rule would result in a more costly system with less efficiency. The small broker-dealers using these systems would have to absorb these costs both in terms of dollars and efficiencies.

Competition among market makers and between market makers and exchange specialists is another area that will be adversely affected by the anti-internalization rule. Small broker-dealers often depend upon such competition to achieve the best available execution for their customers. Thus, the fairness of this competition will ultimately affect small broker-dealers whether they are effecting transactions for their own accounts or customer accounts. The proposed anti-internalization rule with its order exposure requirement and alternative order export requirement would grant exchange specialists an even greater competitive advantage than they now enjoy.

For these reasons, we believe that the SEC's proposed order exposure rule, from a small business perspective, needs to be critically examined.

* * *

If the Committee thinks it would be helpful, we would be pleased to meet with members of the Committee and/or the staff to discuss any or all of the above items in greater detail at your convenience.

* * * *

• Reply To: Joseph F. O'Neil
Executive Secretary

American Council of Independent Laboratories, Inc.

1725 K Street N.W., Washington, DC 20006

March 14, 1983

The Honorable Lowell Weicker, Jr.
Chairman
Senate Committee on Small
Business
Washington, D.C. 20510

Dear Mr. Chairman:

This letter responds to your request of February 3, 1983, for a statement of the legislative priorities of the American Council of Independent Laboratories (ACIL).

ACIL, established in 1937, is a professional association of independent engineering and scientific laboratories dedicated to promoting professional practices. An independent laboratory is a non-tax-favored proprietorship or corporation, unaffiliated with any academic or governmental institutions or with any outside industrial company or trade group, in any manner which might effect its ability to conduct investigations, render reports or give professional counsel objectively and without bias. Member laboratories conduct business in a variety of technical fields. These fields include such engineering and scientific disciplines as analytical chemistry, agronomy, environmental sciences, food and drug technology, fuels and energy evaluation, forensic science and engineering, product evaluation, research and development, chemical, metallurgical, non-destructive testing, electrical, nuclear, petroleum, geotechnical and materials engineering.

Virtually all the members of ACIL are small business firms. At present, ACIL represents approximately 275 member organizations.

ACIL's 1983 legislative priorities reflect the general concerns shared by small business representatives as well as all Americans for a healthy economy. In addition to fiscal, monetary, tax and other general economic policies

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Executive Secretary
Joseph O'Neil
ACIL, Office
Washington, D.C.

designed to speed economic recovery, there are a series of specific issues affecting small independent laboratories and other small professional services organizations, on which your Committee can provide much needed leadership.

Government Competition

One of the most trying problems facing small independent laboratories is to find that government is in the business of business and often is directly competing with independent laboratories. "Government competition" occurs when a governmental agency provides for itself or another government agency, through the use of in-house government personnel, services that could be provided by the private tax-paying sector. Unfair government competition is not just direct but indirect, when government, through tax exemptions, grants and other benefits, creates a favored competitive position for non-profit organizations to market services for their own commercial benefit.

The problem of government competition is not new. In 1980 a special task force established by the SBA Office of Advocacy issued a comprehensive report on the negative impact of government competition on small businesses. Several of the key recommendations of the White House Conference on Small Business in 1980 urged action to eliminate such competition. These recommendations were as follows:

Recommendation 12. Existing Federal research and development procurement, assistance, and tax laws and policies must be modified and new laws enacted to: (1) eliminate unfair advantages enjoyed by governmental agencies, non-profit organizations and educational institutions which compete with innovative small business in providing goods and services, (2) mandate statutorily a national policy of reliance on small business, (3) prevent the Federal government from disseminating proprietary information, (4) prevent the Federal government through the use of its own personnel, including Federal Research Centers, from competing with small business.

Recommendation 26. The Federal government shall be required by statute to contract out to small business those supplies and services that the private sector can provide. The government should not compete with the private sector by accomplishing these efforts with its own or nonprofit personnel and facilities.

Recommendation 28. The Federal government should contract out supplies and services to private industry (particularly small and minority business) and should not compete with the private sector either through the use of its own personnel or through non-profit organizations such as the Federal Research Centers, educational institutions, or other non-profit entities.

The high priority the White House Conference on Small Business placed on dealing effectively with the problem of government competition was the culmination of years of effort by representatives of the public and private sectors to mandate a national policy of Federal reliance on the tax-paying private sector in acquiring needed goods and services. For example, it should be recalled that in 1972 a bipartisan Commission on Government Procurement included among its top recommendations:

Provide through legislation that it is national policy to rely on private enterprise for needed goods and services, to the maximum extent feasible, within the framework of procurement at reasonable prices.

Unfortunately, ten years have passed without Congressional action.

In the last session of Congress, Senator Hayakawa introduced S.J. Res. 93 and Senator East introduced S. 2278, to mandate a national policy of reliance on the private sector. Although several excellent hearings were conducted during 1982, no favorable action was taken on this proposal. In fact, Congress took several major legislative initiatives to restrict the government's ability to use qualified private sector businesses. For example, the Department of Defense Authorization bill for fiscal year 1983 (P.L. 97-252) places a six-month moratorium (until April 1, 1983) on the use of funds to undertake the cost benefit studies which are required under present OMB policy (OMB Circular No. A-76) to determine whether certain commercial functions could be more economically performed in the private sector. This recently enacted law also prohibits any contracting out of fire fighting or security guard functions at military installations. Many of the firms which have for years provided such services are small businesses. The precedent of prohibiting qualified small businesses from performing

specific categories of work for the Federal government where actual experience establishes their qualifications is a devastating setback to efforts to develop workable national policies which make it possible for small businesses to provide services to the Federal government. A variety of other legislative initiatives, all designed to restrict the ability of small businesses to perform commercial services on behalf of the Federal government, were advanced in the last Congress.

Administration efforts to improve and strengthen the existing OMB policy governing conversion of government commercial activities to outside performance (Circular No. A-76) have also been seriously undermined by Congressional intervention.

Additionally, universities and non-profit research institutes, using Federally bestowed tax, grant, postal and other benefits, are rapidly expanding their commercial activities in direct competition with tax-paying small laboratories and other professional services organizations. The university and nonprofit sector has a significant responsibility for fundamental research and education. Independent laboratories need technically trained professionals and the results of the basic research such institutions should produce to remain competitive in today's world economy. To the extent that the resources of non-profit organizations are being diverted to routine work of a commercial character, the ability of the country to develop new technologies, create new businesses, produce well-educated professionals and maintain our competitive position internationally is being eroded.

The National Science Foundation has taken cognizance of the problem of NSF-supported research facilities and equipment being used for commercial purposes. It has developed for comment a thoughtful statement of principles and guidelines in support of its position that

It is contrary to NSF's intent for academic institutions to use NSF-supported research instrumentation or facilities to perform research or services for commercial organizations in direct competition with private companies that provide equivalent research services.

A copy of the NSF policy guidelines is attached for your information. It represents a careful balancing of the proper roles of the university and private sectors and should serve as a model for government-wide application.

Action is overdue to mandate legislatively a policy of reliance on the private sector, including safeguards to assure that nonprofits receive no special preferences or advantages in competing with tax-paying organizations. Indeed beyond this basic requirement that the rules of competition are fair, the time has come for a fundamental review of whether organizations enjoying an exemption from taxation should use this privileged and subsidized position to produce goods and services that can be more efficiently produced by for-profit firms that pay taxes and do not draw on Federal benefits and subsidies of various kinds. Government competition, both direct and indirect, is one of the most pressing problems facing small businesses generally and independent laboratories in particular. ACIL hopes for leadership from your Committee in creating more awareness of this problem and fashioning legislative remedies.

Federal Procurement Policies Generally

In addition to the need to establish a stronger Federal policy of reliance on the private sector in acquiring needed goods and services, there is a fundamental need to improve and simplify the procurement process generally. While the Administration's proposed Uniform Federal Procurement System represents a good beginning, urgent action is needed to improve and simplify Federal procurement of goods and services. We offer no particular blueprint, but strongly urge that the Committee consider measures to assure that small businesses find it more possible to work for the Federal government. One of the great benefits of the Small Business Innovation Research program is that it greatly reduces the complexity of writing a proposal to a Federal agency, thereby saving both time and money. Similar initiatives to improve procurement procedures generally are badly needed. Finally, Federal procurement of and utilization of independent laboratories would be greatly facilitated by a national program to accredit laboratories for technical competence in their fields of expertise. We believe that such a program could be administered by a private sector organization.

Management Assistance: Small Business Development Centers

A survey of attitudes and opinions of small businesses of ten or fewer employees was recently conducted by Safeguard Business Systems along with the University of Texas. This study showed that almost 30 percent listed a lack of management

expertise as the primary cause of business failure. Over 20 percent indicated a need for improved management education for small business owners as a major way to reduce small business failures. Accordingly, it is extremely important that careful attention be given to Federal initiatives to provide management assistance to small businesses.

Since 1976, the Small Business Administration has been establishing Small Business Development Centers in university settings as a means of trying to address this problem. From the beginning, ACIL has questioned whether the program, as conceived and implemented, has been sufficiently clear in its objectives and criteria to provide the most effective management assistance to needy small businesses. Also, ACIL has questioned whether SBA has been sufficiently creative in the mechanisms it has chosen to support. For example, it would conceptually appear that regional small business organizations around the United States might have been appropriate entities to administer SBDC-type programs. Alternatively, state small business councils or Chambers of Commerce might have properly been identified as lead organizations.

A special reason for careful review and assessment of the SBDC program and the experience developed to date is that without proper guidelines and carefully defined relationships among the government, university and business communities, the SBDC program becomes a source of direct competition, particularly for small service-based businesses. To assure an effective working relationship among the interested parties, the composition of national and local advisory committees deserves careful examination; specific and uniform criteria for eligibility for assistance need to be devised; a variety of alternative approaches relying more directly on organizations credible to small businessmen needs to be identified and utilized; and every effort should be made to prevent the program from becoming or appearing to be simply an indirect subsidy to participating universities that are aggressively competing with small professional services firms.

We hope that the Committee will review the testimony that small business representatives gave during Congressional hearings at the start of this program, and will invite the broadest possible participation from interested parties before deciding on whether the SBDC program should continue, and, if so, in what form.

CONCLUSION

ACIL believes that your Committee's 1983 program should include hearings and carefully developed proposals to deal with government competition (both direct and indirect), procurement reform, and simplified, effective initiatives to provide management assistance to small businesses. ACIL looks forward to cooperating with you in developing sound legislation to create an environment within which independent laboratories and other small businesses can better serve the needs of the country.

Very truly yours,

Joseph F. O'Neil
Joseph F. O'Neil

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Attachment

(BY COURIER)

The Small Business Coalition for Pollution Control

President

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Counsel

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February 24, 1983

Senator Lowell P. Weicker
Chairman
Senate Committee on Small Business
Washington, D.C. 20510

Attn: R. Michael Haynes
Chief Counsel

Re: Small Business Pollution Control Financing Guarantees

Dear Chairman Weicker:

This letter is in the nature of a request of the Committee to timely consider and report a bill to amend the Small Business Investment Act to provide for the issuance of tax exempt bonds for pollution control purposes.

The restoration of the guarantees contemplated by such legislation is more critical now than at any time since those guarantees were authorized in 1976. The needs of small businesses and the communities in which they produce and serve for installing pollution abatement facilities and equipment and disposing of wastes have continued, and the advent of a more targeted national focus on the control of toxic and hazardous wastes and substances since the original enactment of this program indicates that those needs may increase.

The 1976 statute, the legislative history surrounding that statute, the four subsequent years of program administration, the need of small businesses for loans and/or the guarantees of those loans to finance facilities and equipment required to comply with Federal, State and local pollution control requirements, the lack of commercial loans for such purposes and the general economic plight of small businesses today have seemingly escaped the attention of the Administration. Since the earliest months of 1981, the incumbent Administration has disrupted this program; since the end of 1981, it has prohibited the use of guarantees with respect to tax exempt bonds for pollution control purposes. It has shown no sign that it will administer the law in accordance with its terms or intent. Thus, the enactment of such legislation is required.

What has happened to many of the small business applicants whose applications were pending at the time the Administration stopped the program is a sad commentary:

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o A New England small business, which had secured a commercial loan on the basis of the Small Business Administration, Office of Special Guarantees, verbal commitment was not allowed to close on the tax exempt bond issue guarantee and may be in severe fiscal trouble as a result.

o All the small business applicants have had returned to them by that Office their original applications, even though most had spent tens of thousands of dollars each, and several had spent over a hundred thousand dollars each, in having their applications for guarantees prepared and pursued.

o The Coalition believes that seven or eight of the original 100+ applicants have gone out of business or otherwise have had to shut down during this period.

o Only three of those applicants were able to proceed with the taxable financing guarantee mandated by the Office of Management and Budget directive, effective after December 31, 1981.

o A Colorado former applicant business has written to us:

"I have proceeded to secure tax free financing without a guarantee. This required me to accept far less favorable terms than I would have been able to obtain with a SBA guarantee, but I could wait no longer."

o A Massachusetts metals plating applicant has written:

"After considerable thought and encouraged by lower rates now available, I have elected to go for SBA funds under the [Small Business Investment Act section] 503 program, with the hope that the current rates may stay stable for a few months, at least."

Unfortunately, the Section 503 program, a highly complicated one involving certified development companies and long term financing through the sale of debentures by the Federal Financing Bank, has been interdicted by the Office of Management and Budget too. Even in those instances where funds are available through the local certified development company, such loans are limited to \$500,000. The average loan guarantee sought by the pending applicants is about three times that level. The Massachusetts applicant here has still not closed on his section 503 loan.

o An Ohio small business has written:

"The absolute compliance date for our industry [manufacture of printed circuit boards] is January of '84. I cannot count on the new Congress being able to do anything that they failed to do in '82. If anything is to be done, it will have to be done quickly."

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o An Illinois company has written of how the OMB-forced disruption in this program forced a delay which undercut it in another way:

"The legislation passed with respect to industrial revenue bonds [the Tax Equity and Fiscal Responsibility Act of 1982] essentially took them out of reach for organizations like my own. Add to that the stonewalling we have received from the Small Business Administration, and we do not have a very encouraging situation."

We believe that what these small businesses have told us has been writ large across the face of all of these applicants, and neither we, nor you, nor SBA, nor OMB, nor Treasury, nor anyone else in the Administration can tell us of the number and nature of another 100+ applicants which would have assuredly come forward with applications in 1981, 1982, and now 1983, had this program not been disrupted and the original authority prohibited.

Few persons in this capital city have followed as closely as I have what has gone on, or not gone on, inside the Small Business Administration with respect to this issue. There are some within SBA who believe strongly in the original program, but all within SBA know that they are a part of the incumbent Administration. That Administration has said in recent months to those SBA officials, in essence, try to find a way to make a taxable program work.

On February 4, 1983 the Deputy Associate Administrator of SBA for Investment, Mr. Robert G. Lineberry, convened a morning meeting of persons within SBA and outside parties to review the status of the current program, to ascertain the demand for tax exempt financing, to determine the status of legislation to restore that financing, and, most importantly to SBA, to analyze variously proposed measures which, singularly or jointly, would constitute a viable taxable program. I attended that meeting, and I am thankful to SBA for the opportunity to have done so. Others invited represented state pollution control and industrial financing authorities, investment companies and other financial intermediaries, legal counsel to the foregoing, etc. Although the discussion was informative, touching upon private sector involvement in processing, administration and risktaking (commercial banks, insurance companies, investment bankers and State authorities), financial vehicles (loan agreements, loan and security agreements, corporate debentures, guaranteed interest certificates, leasing and leveraged leasing), interest rates (fixed, variable and floating) and fees (guarantee fees, processing fees and administrative fees), my conclusion is that any taxable program would take months, if not longer, to develop, review, clear, publish, receive and incorporate comments and suggested amendments, republish and implement. In no instance would a taxable program assist small businesses in meeting the pollution abatement and waste disposal requirements imposed upon them by Federal, State and local authorities as rapidly as would an OMB rescission of its own directive to SBA on one hand or the enactment of legislation on the other.

We recommend the enactment of legislation identical to that reported by the Committee to the Senate last year. This is important legislation. In our

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opinion, its provisions go as far toward the reestablishment of this program in the context of the intent of the Impoundment Control Act of 1974 as can be done without an actual amendment to that Act. It is clear that this legislation means that, if Congress does enact it and the President does sign it in whatever manner, the intent of Congress is unequivocally that the Small Business Administration shall proceed to guarantee loans based on tax exempt bonds, i.e., that Congress does not intend for that matter to be discretionary with OMB or SBA or any other entity of the Government of the United States.

We ask that the prospect of such legislation being considered be added to the Committee agenda to emerge from your February 25 staff deliberations and meetings.

We applaud the efforts of the Committee and those of its leadership in moving quickly and decisively this Session to restore this badly needed program.

The Small Business Coalition for Pollution Control remains ready, willing and able to assist in any and every way possible the realization of our mutual objectives.

Respectfully submitted,



Randal C. Teague
Counsel

/KS

cc: Sen. Rudy Boschwitz
Sen. Alfonse D'Amato
Sen. Carl M. Levin
Sen. Pete Wilson

PROFESSIONAL SERVICES COUNCIL
STATEMENT BEFORE THE SENATE SMALL BUSINESS COMMITTEE HEARINGS
February 25, 1983

It's a pleasure to be here today. My name is Sylvia von Bostel, Associate Director of the Professional Services Council, an umbrella organization that services several hundred firms and five associations--the American Council of Independent Laboratories (ACIL), the American Society of Agricultural Consultants (ASAC), ACME (the association of management consulting firms), the Association of Productivity Specialists (APS), and Professional Engineers in Private Practice.

We wish to bring to your attention proposed regulations on cost principles concerning "political advocacy," which have recently been issued for comment by Executive Branch agencies. The proposed regulations that affect our members are contained in a draft Defense Acquisition Regulation concerning the "cost principles for political advocacy," issued by the Defense Department. Similar regulations are being proposed by GSA and NASA, and OMB has issued identical revisions in OMB Circular A-122 pertaining to non-profit organizations.

The new concepts embodied in the proposed regulations will pose serious obstacles to, and restraints on, the manner in which our members, or any government contractor, can conduct business operations. We view this new approach as being totally inconsistent with President Reagan's policies and the Administration's efforts to reduce government regulation and paperwork. Equally important are the public policy

aspects of these new regulations, particularly in the eyes of the business community. The changes raise questions about constraints on freedom of speech and petition, the use of non-working hours by individuals, exemption of unions from some of the proposed provisions, and the constitutionality and legality of several of the provisions, which should not be dealt with by the techniques of administrative regulations.

The draft DAR goes far beyond the currently accepted cost principles relating to "lobbying," or to use the new term "political advocacy," and will create major management, operation, and administrative problems for government contractors. No provision is made for the exercise of reasonable judgment in disallowing costs as they might involve "political advocacy." The costs of personnel, space, equipment, supplies and so forth are disallowed if they are tainted by "political advocacy."

To avoid disputes with government auditors over interpretation and application of the proposed DAR on space and equipment usage for "political advocacy," a company would have to establish in a different building a completely separate set of fully furnished and equipped offices to avoid contaminating building space and equipment used for federal, state, or local contract work. Small businesses will be particularly hard hit, because their financial resources are limited and they are less able to fund separate but parallel operations.

We strongly urge that the proposed DAR be abandoned. A substitute should be delayed until DOD has had more extensive discussions with industry on how to define and solve whatever

valid problem is at the root of the current concern about "political advocacy" by DOD contractors.

The Defense Department has given industry copies of the draft DAR for comments which are due March 8. We are calling this matter to your attention before this ill-advised set of regulations becomes effective. We would greatly appreciate your assistance in raising this issue at the White House staff level and with the Secretary of Defense.

Thank you.

socma

SYNTHETIC ORGANIC CHEMICAL MANUFACTURERS ASSOCIATION, INC.
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STATEMENT OF
JOHN R. YOST, CHAIRMAN
SMALL BUSINESS COMMITTEE, SOCMA

TO
SENATE COMMITTEE ON SMALL BUSINESS

RECOMMENDATIONS REGARDING THE NEEDS OF
SMALL BUSINESS IN COMPLYING WITH ENVIRONMENTAL REGULATIONS

February 25, 1983

I appreciate your invitation to present the concerns of the Synthetic Organic Chemical Manufacturers Association (SOCMA) for the Committee's consideration in setting its legislative agenda and oversight activities. Unfortunately, I cannot appear at the Committee's scheduled session on February 25, but I do wish to submit this statement for the record on behalf of SOCMA.

SOCMA is a non-profit trade association representing over 100 organic chemical companies, the majority of which are small companies with annual sales under \$50 million. The members of SOCMA produce more than 5,000 distinct synthetic organic products which are primarily intermediates and finished chemicals for industrial use. A list of member companies is attached.

I urge the Senate Small Business Committee, as part of its legislative and oversight agenda, to hold hearings on the needs of small business in complying with environmental regulations. The implementation of environmental regulations has had and will continue to have a significant and disproportionate impact on small business, in general, and small chemical companies, in particular. At a time that the Congress will consider the reauthorization of the fundamental statutes of environmental control and during a period that the Environmental Protection Agency will propose or promulgate a

number of regulations with direct and important impacts on small business, SOCMA believes that the Small Business Committee should hold hearings to examine methods that EPA and other agencies could adopt to minimize administrative burdens on small businesses and to assist them in complying with environmental standards.

Although my remarks apply to EPA programs under the Resource Conservation and Recovery Act, the Clean Water Act and the Clean Air Act I will use the Toxic Substances Control Act to illustrate the compliance problems which small firms have and the need to review what the agency is doing to address them.

To survive and prosper, a small chemical company must be able to innovate and respond quickly to the immediate and specialized needs of a customer. However, the overall impact of TSCA has reduced the competitive advantages which small companies with low overhead have over large companies to meet customer needs in a prompt and economical manner. The pre-manufacture notification requirements for new chemicals with its delays and data requirements has had a particularly heavy impact on small firms. There is ample evidence in the literature to support this point. For example, a study by the Regulatory Research Service for the Chemical Specialty Manufacturers Association (CSMA) concluded that TSCA requirements have had a substantial adverse impact on innovation as a

whole which was "particularly heavy for firms in smaller size classes."^{1/} A recent study by Battelle reached the same conclusion.^{2/}

Small chemical companies are disproportionately impacted because they generally produce low volume chemicals in quantities under 10,000 pounds annually which generate insufficient revenues to cover the costs of premanufacture notification. Similarly, small chemical companies lack the in-house technical staff available to large companies to generate extensive toxicological and environmental information and lack the administrative capability to handle extensive reporting and recordkeeping requirements. Thus, a small company has to divert limited staff resources from essential tasks to comply with TSCA's requirements or hire outside consultants and other personnel.

In light of the adverse impacts of TSCA on small business, it is imperative for EPA to develop and maintain a continuing awareness of the problems and needs faced by small companies in complying with TSCA requirements. Recently, EPA

^{1/} "Impact of Toxic Substances Control Act on Innovation in the Chemical Specialties Manufacturing Industry" at 3 (Jan. 1982).

^{2/} Small Business Administration, Costs of Compliance in Small and Moderate-Sized Businesses 23 (1980) (Prepared by Battelle Human Affairs Research Centers); see also EPA, Office of Pesticides and Toxic Substances, "Economic Impact Analysis of TSCA Section 5(h)(4) Exemptions: Low Volume Chemicals" 27 (Apr. 1982) (EPA Doc. No. 53).

has taken several commendable measures which address small business problems under various TSCA requirements. These actions have included the appointment of a small business ombudsman in EPA's Office of Management and Policy Review, the issuance of a proposed small business exemption for most reporting and recordkeeping rules under Section 8(a), and the publication of a proposed PMN exemption for low-volume chemicals and site-limited intermediates. While there has thus been progress on several matters of concern to small business, more needs to be done if small chemical companies are to continue as viable members of the chemical industry.

SOCMA believes that the Small Business Committee should review the problems which the entire TSCA program presents to small business and instruct EPA to develop an integrated policy for minimizing these problems consistent with providing adequate protection for human health and the environment. This review should encompass small business impacts under the entire Act in order to identify and evaluate the cumulative impacts presented by it. In addition, the review should encompass a broad time perspective so that both past and future small business impacts under the Act are considered. Too often in the past, EPA has viewed an individual TSCA rulemaking and its impact on small business as being separate and distinct from other rulemakings. A broader perspective is urgently needed.

In light of the impacts identified by the above review, EPA should be requested to develop and utilize an integrated policy which requires EPA to minimize the adverse impacts of TSCA on small entities. The policy should be statute-wide and address the cumulative impacts of TSCA on small business; similar statute specific policies should be developed for the other acts. In developing such statute-wide small business policy for TSCA EPA should obtain the following critical information:

1. a profile of small chemical companies subject to TSCA requirements including their size, number of employees, sales revenues, kind of product line, number of new chemicals introduced, ability to absorb regulatory costs, and other relevant information;
2. a description of the impacts on small business of compliance with existing and anticipated TSCA requirements, including the impact on innovation, capital formation and health and environmental protection, and a description of the financial, personnel and administrative resources necessary for efficient compliance with such TSCA requirements; and
3. an identification of all relevant federal and state rules and programs which may duplicate, overlap or conflict with TSCA requirements.

The information compiled from this evaluation could be used by EPA in future TSCA rulemakings to evaluate both the small business impact presented by a particular proposal and its contribution to the cumulative burden posed by all TSCA requirements.

As suggested in the Regulatory Flexibility Act, the regulatory options which should be covered in the small business policy include:

1. the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities;
2. the clarification, consolidation or simplification of compliance and reporting requirements for such small entities;
3. the use of performance rather than design standards; and
4. an exemption from coverage of any rule, or any part thereof, for such small entities.

In addition, other options unique to TSCA should be considered, including the expansion of the current outreach program in the TSCA Office of Industry Assistance to include manuals and other informational tools geared to small business, and the expansion of certain health and environmental effects research by the Agency.

An important component of any evaluation of the impact of regulations on small business is the definition of small business. EPA has used widely varying small business definitions in prior Section 8(a) rulemakings. We believe that a consistent small business definition should be finalized for use in evaluating the impact on small business of all TSCA rules.

Adoption of a comprehensive small business policy by EPA would have demonstrable benefits to small companies by minimizing the burden and expense of complying with EPA regulatory requirements. As a result, these companies could become more innovative and productive. At the same time, this policy would enhance TSCA's objectives by eliminating unnecessary burdens and facilitations compliance with necessary requirements, thereby permitting company resources to be focused on significant health and environmental concerns. Thus, it would provide substantial benefits to small companies while supporting the health and environmental objectives of TSCA.

Again, I have commented on the need to evaluate small business environmental compliance problems only in the context of one statute -- TSCA; yet my comments are general in scope. Small business problems are too often an after-thought in the consideration of environmental policy.

In summary, I believe that the Committee's legislative and oversight agenda should include hearings on the cumulative impacts of environmental regulation, the degree to which small business concerns are presently considered in the development of environmental policy, the consideration of means to increase consistency of approach and minimization of unnecessary economic impacts, and the recommendation of initiatives that would facilitate compliance by small firms. Thank you for your consideration.

SOCMA MEMBERSHIP

ACETO INDUSTRIAL CHEMICALS CORP.
ALBANY INTERNATIONAL CORP.
ALLIED CORP.
AMERICAN CYANAMID CO.
AMERICAN HOECHST CORP.
AMOCO CHEMICAL CORP.
BASF WYANDOTTE CORP.
BERNCOLORS-POUGHKEEPSIE, INC.
BIDDLE SAWYER CORP.
BOFORS NOBEL, INC.
BORDEN CHEMICAL CO.
BUFFALO COLOR CORP.
CAREY INDUSTRIES, INC.
CARROLL PRODUCTS, INC.
CELANESE CORP.
CHATTEM, INC.
CHEMICAL EXCHANGE INDUSTRIES
CHEMTAN CO., INC.
CROMPTON & KNOWLES CORP.
CROWN-METRO, INC.
DAY-GLO COLOR CORP.
DOW CHEMICAL U.S.A.
DREW CHEMICAL CORP.
DU PONT DE NEMOURS & CO., E. I.
DYE SPECIALTIES, INC.
EAST SHORE CHEMICAL CO., INC.
EM INDUSTRIES, INC.
ESSEX CHEMICAL CORP.
EVANS CHEMETICS
FAIRMOUNT CHEMICAL CO., INC.
FIKE CHEMICALS, INC.
FIRST CHEMICAL CORP.
FIRST STATE CHEMICAL CO., INC.
FMC CORP.
GAF CORP.
HEXCEL CHEMICAL PRODUCTS
HILTON-DAVIS CHEMICAL CO., THE GROUP OF STERLING DRUG, INC.
H & S CHEMICAL, INC.
HUMPHREY CHEMICAL CO., THE
ICI AMERICAS, INC.
JARCHEM INDUSTRIES, INC.
KOHNSTAMM, H., & CO., INC.
LOCTITE CORP.
LONZA, INC.
MALLINCKRODT, INC.
MERICHEM CO.
MILLIKEN CHEMICAL, DIV. OF MILLIKEN & CO.
MOBAY CHEMICAL CORP.
MONSANTO COMPANY
MOONEY CHEMICALS, INC.
MORTON CHEMICAL CO.
MUSKEGON CHEMICAL CO.

NATIONAL STARCH & CHEMICAL CORP.
 NAPP CHEMICALS, INC.
 OCCIDENTAL CHEMICAL CO.
 OLIN CORP.
 PATRICK & CO., INC., C. H.
 PENNWALT CORP.
 PFISTER CHEMICAL, INC.
 PHILLIPS CHEMICAL CO., A SUB. OF PHILLIPS PETROLEUM CO.
 POLAROID CORP.
 PPG INDUSTRIES
 PRODUCTS RESEARCH & CHEMICAL CORP.
 RSA CORP.
 REILLY TAR & CHEMICAL CORP.
 RHONE-POULENC, INC.
 SALSBUURY LABORATORIES
 SANDOZ COLORS & CHEMICALS
 SAYTECH, INC.
 SOLUOL CHEMICAL CO., INC.
 STANDARD CHLORINE CHEMICAL CO., INC.
 STAUFFER CHEMICAL CO.
 STERLING ORGANICS, A DIVISION OF STERLING DRUG, INC.
 SUN CHEMICAL CORP.
 SYNALLOY CORP., BLACKMAN UHLER CHEMICAL DIV.
 THIOKOL/SPECIALTY CHEMICALS DIV.
 UNION CARBIDE CORP.
 UPJOHN CO., THE
 WHITE CHEMICAL CORP.
 WITCO CHEMICAL CORP.
 WYCKOFF CHEMICAL CO.

ASSOCIATE MEMBERS

ATLANTA CHEMICAL CO., INC.
 BIESTERFELD U.S., INC.
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 CHEMICAL CONTROL & MANAGEMENT SERVICES, INC.
 CHEMISPHERE CORP.
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 GREEFF & CO., INC., R. W.
 KENNEDY & KLIM, INC.
 MINCKLER & ASSOCIATES, HOWARD L.
 MERCANTILE DEVELOPMENT, INC.
 MITSUI & CO., (U.S.A.), INC.
 MONTEDISON USA, INC.
 NACHEM INCORPORATED
 PYLAM PRODUCTS CO., INC.
 SPRINGBORN REGULATORY SERVICES, INC.
 SRS, INC.
 WILSON DYE & CHEMICAL DISTRIBUTORS, INC.

Testimony of Denis R. Zegar
On Behalf of the National-American Wholesale Grocers' Association

Before the U.S. Senate Small Business Committee

February 25, 1983

Preliminary Statement

I am Denis R. Zegar, Vice President, Government Services for the National-American Wholesale Grocers' Association (NAWGA). I am submitting this statement on NAWGA's behalf before this Committee which is currently reviewing what small business associations and their members feel the Committee should be doing in 1983.

NAWGA is a national trade association representing nearly 400 independent grocers and food service distributors. These companies, both large and small, supply grocery products and provide a wide array of services to retail grocery stores, hospitals, schools, restaurants and other food service establishments throughout the United States. Marketing products from over 800 separate distribution centers, NAWGA member companies account for nearly \$50 billion of the nation's grocery product volume and one-third of the grocery supplies distributed nationally. NAWGA's food service division, the International Foodservice Distributors' Association (IFDA), represents member firms who sell annually over \$10 billion in food and related products to the institutional, away-from-home food service market.

Mr. Chairman, I welcome this opportunity to present to the Committee the views of our members and what we believe to be the primary issues for the 98th Congress. As has been the case in past years, capital formation and retention is still a critical issue for our members. However, unlike years past, large and growing deficits and high interest rates have stymied economic growth and retained earnings. With budget deficits entering the stratosphere, the Federal Government must borrow record amounts to finance growing deficits, thus keeping interest rates at abnormally high levels. It is little wonder that unemployment is the highest it has ever been and the recession lasting longer than any expert anticipated.

Issues that must be paramount in importance for the 98th Congress are: reducing budget deficits and bringing down interest rates, thus putting people back to work. With that said, let me briefly mention several issues that should be addressed by the Senate Small Business Committee.

- (1) Reduce Corporate Tax Rates: the most direct and efficient way for business to generate sufficient internal cash thereby minimizing the need to go to the capital markets,

is to reduce corporate rates. Reducing corporate rates benefits both labor and capital intensive industries equitably.

- (2) Capping Social Security Payroll Taxes at Present Levels: the wholesale grocery industry is labor-intensive. As a matter of national interest it is imperative that we put people back to work. Raising payroll taxes at a time that unemployment has reached double-digit figures, to bail out a Social Security system that is structurally flawed, will accomplish little and place the burden of recovery on small business.
- (3) Preservation of Accelerated Depreciation for Structures at Present Levels: the wholesale grocery industry is one of the most competitive and innovative industries in our nation. To remain a healthy and viable industry, it is imperative that wholesalers have the same opportunity to improve their warehouses as capital intensive industries have in replacing equipment. An inefficient food distribution system would add to the cost of food at the supermarket and restaurants thereby risking new inflationary pressures.
- (4) Simplification and Reform of the Inventory Evaluation Methods for Tax Purposes: LIFO reform should continue so that inventory intensive industries, such as ours, are not taxed out of the business.
- (5) Retention of the Investment Tax Credit for Used Machinery up to a Value of \$150,000 Contained ERTA.

Another critical area that the Senate Small Business Committee should become an active participant, is in the area of Multiemployer Pension Withdrawal Liability. In 1980 Congress passed the Multiemployer Pension Plan Amendments Act. Provisions of this Act have proven to be onerous and burdensome to all business, specifically, small business. For small businesses that are a member of a union pension plan, their ability to sell their business or buy another business, is severely impeded and sometimes prevented. A lifetime of hard work and savings can be wiped out because of a law that was passed that few members of Congress understood.

In conclusion, Mr. Chairman, NAWGA appreciates the opportunity to present our views on these issues and which we believe the Committee should focus during the 98th Congress. We also look forward to working closely with the Committee in bringing about the changes that I have described as well as other issues identified before the Committee this morning.

